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EFFECT OF THE ANTICIPATORY BREACH OF AN EXECUTORY CONTRACT OF SALE UPON THE PASSING OF THE TITLE AND THE RIGHT OF THE VENDOR TO SUE FOR THE PURCHASE PRICE.

That our western courts do not consider themselves under subjection to any weight of judicial authority is evidenced by the case of Dowagiac Manufacturing Co. v. Higinbotham, 91 N. W. Rep. 330, in which the Supreme Court of South Dakota held that under section 3258 of the statutes, providing that title is transferred by an executory agreement for the sale of personal property when the buyer has accepted the property, or when the seller has prepared it for delivery and offered it with intent to transfer the title, where a buyer without excuse refuses to accept personal property properly tendered by the seller, the title vests in the buyer as if he had accepted it. One of our correspondents, general counsel for a prominent agricultural implement house in Chicago, in calling our attention to this decision, writes: "I understand that machine men have been carrying around the country a certified copy of this decision ever since it was rendered on April 1st, last, for the purpose of showing to farmers that when they give a written order for a machine not yet manufactured they will be required to pay the purchase price, notwithstanding the fact that they have countermanded their order before any particular machine has been set apart or appropriated to the contract. Of course, it would be much better for the company I represent for the law to be as the Supreme Court of South Dakota have declared it to be, but the law is stated incorrectly."

We are constrained to agree with our correspondent in his criticism of the decision of the South Dakota court, just noted, as contrary to the weight of authority. The distinction between an actual sale and an executory contract of sale is that in the former the title passes at once to the buyer, while in the latter it rests in the seller awaiting some act of appropriation or identification. All contracts, therefore, in which the particular thing ordered or contracted for is not specifically separated, identified or appropriated, are executory. They become executed only by the appropriation of specific goods to the contract. This rule is well recognized and no difficulty is experienced except in cases like the one before us where the buyer withdraws his assent to the contract before the *appropriation* and therefore before title passes to him. In such cases, although the authorities are not uniform, the rule is that the seller cannot sue for the purchase price of the goods since no particular goods have been *sold* up to the time of the buyer's refusal to receive anything under the contract. The principle here contended for is illustrated by few of the latest authorities.

Thus, in the recent case of Unexcelled Fire Works Co. v. Polites, 130 Pa. St. 536, 18 Atl. Rep. 1058, the Supreme Court of Pennsylvania held that where after the seller has accepted a written order from the buyer for goods to be shipped on a certain date, the latter notifies him not to ship them and refuses to accept them from the carrier when they are shipped, an action will not lie for the price of the goods, but for the damages for the refusal to accept them. The court said: "It is plain that the notice given to the plaintiff by the defendant not to ship the goods was a repudiation of the contract. It was not a rescission, for it was not in the power of any of the parties to rescind; but it was a refusal to receive the goods, not only in advance of the delivery, but before they were separated from the bulk and set apart to the defendant. The direction not to ship was a revocation of the carrier's agency to receive, and the plaintiff thereby had notice of the revocation. The delivery of the goods to the carrier, therefore, was unauthorized, and the carrier's receipt would not charge the defendant." See also as sustaining the rule here announced, Jones v. Jennings Bros. (Pa.), 32 Atl. Rep. 51; McCormick Harvesting Co. v. Cusack (Mich.), 74 N. W. Rep. 1005. In this last case the court held that the plaintiff could not recover the contract price for a machine that the defendant had ordered to be consigned to the care of "S," agreeing to give notes on the delivery thereof, even though it was shown that plaintiff had consigned several machines to S, but consigned none to him in the name of the defendant, and thereafter defendant told S that he had countermanded his order.

It will be observed that plaintiffs lost their case because S had failed to set apart any particular machine for Cusack before he countermanded his order. Just the opposite result was reached, however, on a very similar state of facts in the recent case of McCormick Harvesting Co. v. Markert (Iowa), 78 N. W. Rep. 33.

We believe that both the logic of the law and practical justice sustains the right of the buyer to refuse, in advance, to receive anything which he may have agreed to purchase under his executory contract of sale, and for such anticipatory breach of his contract he cannot be held for the purchase price of the goods which were never identified or appropriated as his property. When an order for goods is received and accepted by the seller, to be delivered at a certain time, the receipt and acceptance of the order does not constitute a complete or executed contract until the goods are delivered or appropriated to the buyer's contract, and if the purchaser countermands his order before that time, or before the goods have been separated from the general mass, he cannot be compelled to pay the contract price. The seller in such cases is thrown upon his right of action against the purchaser for breach of contract in which the measure of damages is usually the difference between the contract price and the market price at the time and place of delivery.

NOTES OF IMPORTANT DECISIONS.

HEALTH — IS CONSUMPTION A CONTAGIOUS DISEASE.—Appellate and trial courts with the assistance of several juries are endeavoring to solve the difficult riddle whether consumption is a contagious disease, within the statute requiring physicians to notify the health department thereof. The question first arose in the case of People v. Shurly, 124 Mich. 645, 83 N. W. Rep. 595, which reversed the decision of the trial court and remanded the case for a new trial. It was there held that the statute required an attending physician to report cases of consumption, if consumption was in fact a disease which is dangerous to the public health. On the second trial numerous special questions were presented to the jury, who found that consumption is the most prevalent disease in Michigan, and causes more deaths than any other disease; that it is a disease dangerous to the public health; that it is contagious from man to man,—but found that it is not, by reason of its contagious nature, a disease dangerous to the public health, and that it is not to be classed with such well known diseases, dangerous to the public health, as smallpox, scarlet fever, measles, cholera, and diphtheria. The supreme court, in reversing the judgment of the trial court, said:

"The question whether consumption is to be classed with smallpox, scarlet fever, measles, cholera, and diphtheria should not have been submitted to the jury. If the disease is contagious and dangerous to the public health, the law classifies it. It is altogether probable that this question led the jury away from the main issue, and made way for the answer that consumption is not, by reason of any contagious nature, a disease dangerous to the public health. Certainly it is difficult to reconcile such a finding with the findings which show it to be so fatal a disease that it is contagious from man to man, and that it is dangerous to the public health. The court, on request of defendant's counsel, charged as follows: 'If the verdict is for the people, it means that the statute relating to diseases dangerous to the public health has been enlarged or made to include consumption, and that disease must participate within that statute. I will not say that it must participate with the same strictness, but it must be reported,—name, age, and condition. It must come reasonably within the same family as a contagious disease. If the statute is made to include consumption among the dangerous diseases to public health, the state and local boards of health may treat it in the same manner prescribed by the statute for the care and control of other specific diseases, kindred in their nature.' We think these instructions were misleading, and calculated to commit to the jury duties which the law casts upon the court. It is not correct to say that, if consumption is found to be a dangerous disease, the statute has been enlarged by such finding. As we held on the former hearing, if consumption is a disease dangerous to the public health, it is within the statute, as enacted by the legislature, and it follows that the statute has not been enlarged. The term is exceedingly unfortunate and misleading."

CONVERSION—RIGHT TO RECOVER STOLEN OR WRONGFULLY DETAINED PROPERTY FROM THE HANDS OF A BONA FIDE PURCHASER, WHERE THE NEGLIGENCE OF THE OWNER PERMITTED THE PROPERTY TO BE WRONGFULLY CONVERTED.—The judgment of the house of lords in Farquharson v. King is one of a number of modern decisions which proves how limited is the application of the well-known *dictum* in Lickbarrow v. Mason that "whenever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it." The facts were very simple. A confidential clerk of the appellants, a firm of timber merchants, had authority from them to sign delivery orders in respect of timber warehoused bythem in the Surrey Docks. Assuming the character of a timber agent and the not uncommon name of Brown, he by signing such orders procured certain quantities of their timber to be trans-

ferred to an account which "Brown" opened with the dock company. Then "Brown" sold the timber to the respondents, pretending to be acting as agent for a well-known merchant. The appellants brought their action for the detention or conversion of the timber. In the court of appeal the majority held that the case came within the rule laid down by Mr. Justice Ashhurst in the *dictum* quoted above. The house of lords have now reversed this decision on the ground that the case was simply one in which the owners of the goods sued the purchaser from a wrongdoer who could give no title. There was no question, they said, of estoppel; the appellants had made no representations of any sort to the purchasers who did not know that "Brown" was their clerk. There was no negligence on the part of the appellants in giving a trusted clerk authority to sign delivery orders; and even if there had been, such decisions as those of the house of lords in The Bank of Ireland v. The Trustees of Evans' Charities, 5 H. L. Cas. 389, and Scholfield v. The Earl of Londesborough, 65 Law J. Rep. Q. B. 593; L. R. (1896) App. Cas. 514, prove that the mere negligence of an owner of property which has enabled another person to commit a crime does not operate as an estoppel. The result of the house of lords' judgment is to show that the rule in Lickbarrow v. Mason has no application to wrongful dealings with goods, except where the wrongdoer is intrusted with the goods themselves or with the documents of title, or has in some other way been held out by the owner to a purchaser or assignee as having authority to deal with the goods. One remarkable thing about this case was the manner in which the law lords expressed their disagreement with the decision of the court of appeal. "If," said the lord chancellor, "it had not been for the opinion of the learned judges below, I should have said this was a plain case," and he proceeded to say that he was "bewildered" by an argument which must have impressed both the late master of the rolls and Lord Justice Vaughan Williams. Lord Macnaghten, one of the few judges who know how to extract a little gaiety from judicial work, was even more caustic in his treatment of the judgment of the court of appeal. He began his judgment: "After what has fallen from my noble and learned friend on the woolsack I am almost ashamed to trouble your lordships with any observations of my own. But the case is peculiar in one point of view. I cannot remember any case in which the wealth of learning and argument was so far beyond the value of the poor and common-place material on which it has been expended."—*Solicitor's Journal.*

ARMY AND NAVY — RIGHT OF PARENTS TO SECURE RELEASE OF MINOR SON ON HABEAS CORPUS PENDING COURT MARTIAL PROCEEDINGS FOR HIS DESERTION.—A very interesting illustration of the conflict that sometimes arises between civil and military tribunals is offered by the recent case of *In re* Miller, 114 Fed. Rep. 838. This case was a proceeding of *habeas corpus* by the parents of a minor who enlisted without their consent to secure his release from military authority, while charges were pending against him for desertion. The United States district judge sustained the right of parents to the custody of their child, which ruling, however, was overturned by the circuit court of appeals in the case we have just cited. The United States statutes provide that army recruits must be between 16 and 35 years old; that no one under 21 years shall be enlisted without the consent of his parents or guardians; and that no one under 16 years old shall be enlisted. The minor in this case was seventeen years of age, but fraudulently represented himself to be twenty-one. Shortly after enlistment he deserted and returned home, where, however, he was arrested and held subject to the action of the court martial. The court said in part:

"A court martial proceeding, within its jurisdiction, will not be interfered with, nor its judgment avoided, by the civil courts. Smith v. Whitney, 116 U. S. 167, 6 Sup. Ct. Rep. 570, 29 L. Ed. 601; *Ex parte* Reed, 100 U. S. 13, 25 L. Ed. 538. The common law, unaided by statute, fully recognizes the parents' right to the custody and services of their minor child; but it has never been held that they could, by the writ of *habeas corpus* or otherwise, obtain his custody and his immunity when he was held by an officer of a civil court of competent jurisdiction to answer a charge of crime. His enlistment having made the prisoner a soldier notwithstanding his minority, he is amenable to the military law just as the citizen who is a minor is amenable to the civil law. The parents cannot prevent the law's enforcement in either case. It is not reasonable that a minor, of age to enlist, who secures the honorable and responsible position of a soldier in the United States army, could abandon his colors in the face of the enemy and on the eve of battle, and avoid trial and punishment for desertion by the intervention of his parents, who had not consented to his enlistment, but who had taken no step to avoid it before the soldier's arrest for desertion; or that he could endanger the army by betraying its secrets to the enemy, and not be amenable to military jurisdiction, his parents objecting. We cannot approve a view that leads to such results. When an enlisted soldier is imprisoned by military authority upon a charge of desertion or other military crime, a civil court will not interfere on *habeas corpus* when such military authorities have jurisdiction; and if a minor, over the age of 16 years, enlisted in the service, is so charged and detained, a civil court will not, either on his own application or that of his parents or guardian, discharge him until he has been released from the prosecution pending against him.

The law as announced in this case is sustained by the authorities. In McConologue's Case, 107 Mass. 154, 170, Gray, J., speaking for the court, said that "a minor's contract of enlistment is, indeed, voidable only, and not void; and if, before a

writ of *habeas corpus* is sued out to avoid it, he is arrested on charges for desertion, he should not be released by the court while proceedings for his trial by the military authorities are pending." See also Solomon v. Davenport, 30 C. C. A. 664, 87 Fed. Rep. 318; *In re* Cosenow (C. C.), 37 Fed. Rep. 668; *In re* Kaufman (C. C.), 41 Fed. Rep. 876; *In re* Spencer (D. C.), 40 Fed. Rep. 149; *In re* Morrissey, 137 U. S. 157, 11 Sup. Ct. Rep. 57.

WARRANTY—WHETHER ONE WHO RENTS A SEAT FROM WHICH TO VIEW A PROCESSION IMPLIEDLY WARRANTS THAT THE PROCESSION SHALL TAKE PLACE.—Lawyers and laymen in England are seriously considering the question of the effect of the postponement of the coronation upon the rights and liabilities of seat-holders who had contracted or already paid for seats from which to view the coronation procession. The law journals of that country are attempting to enlighten the people on the deep and subtile points involved in this question. The *Law Journal* of London reasons out the question very learnedly as follows: "The question 'Are we entitled to a return of the money which we paid to view the coronation procession?' is one which many people have been asking during the last few days. In some cases the express terms of the contract make it clear either that the money paid for a seat or window would be returned or that it would be retained in the event, which unhappily occurred, of the coronation being postponed. In other cases there may be nothing to show what was the intention of the parties, and indeed the possibility that the coronation would not take place was perhaps not even contemplated by those who rented the seats or windows. The first question which arises in such a case is whether the person who let a seat impliedly warranted that the procession would take place. It does not seem reasonable to imply an intention to make such a warranty, which would make the party giving it liable in damages for its breach, the procession being a matter beyond his control. It may, however, be argued that the event of the coronation must have been contemplated by the parties as the foundation of the contract, and therefore that the contract was dissolved by the non-happening of that event. Taylor v. Caldwell, 32 Law J. Rep. Q. B. 164; 3 B & St. 826, may be relied on in support of this proposition. That, however, was a very different case. The defendant had agreed to give the plaintiff the use of a music hall on a given day, before which it was destroyed by fire. Thus the defendant could not perform what he had contracted to do—viz., place the hall at the other party's disposal. The principle on which the judgment of the court was based was that 'where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled, 'unless when the time for the fulfillment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continued existence as the foundation of what was done; then in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor.' In applying that principle one is driven back to the question, what was the contract which the person who let the seat had to fulfill? If there was no warranty or promise that the procession would take place, his contract was to place a certain seat at the disposal of the other party for a certain time, and the existing authorities do not go far enough to establish that the celebration of the coronation was by implication of law the event on which the existence of such a contract depended."

The *Solicitor's Journal*, discussing the same question, says,as follows: "The postponement of the coronation has disapppointed a vast number of seat-holders who have already paid the price of their seats, and the law relating to their rights and liabilities has been eagerly discussed. We cannot agree with the view of a writer who, in a letter to the *Times*, suggests that Taylor v. Caldwell, 3 B. & S. 826, is in point, and that where seats have been taken "to view the coronation procession" the price of the seat is paid subject to the implied condition that, in the event of the coronation being abandoned, the money shall be returned to the person who has paid it. We cannot for this purpose see any distinction between the hire of a seat to view the coronation and the hire of any movable article which might be required on the day of the coronation. It is scarcely consistent with common sense that the whole loss occasioned by the disaster should fall upon the person who has provided the seat and incurred the additional expense of partitions, steps, chairs and awnings, rather than upon the hirer who has paid his money without taking into consideration the possibility of an accident. We think, too, that every case must be governed by the special circumstances. If the postponement had occurred two or three weeks earlier, the seat-holder would have had a stronger claim to the return of his money."

SCOPE OF TERM "HOMESTEAD."

The term "homestead" is used in a great variety of significations. It has one sense in popular conception and another in its legal aspects. It has special meanings in wills, and in deeds or other conveyances, and in pleadings. In statutes it may have its meaning greatly affected by the accompanying phraseology. In particular jurisdictions it may be given local meanings of the most

divergent character. It is not possible in an article like the present to discuss all these meanings. It will suffice to consider some of the most important of these significations, as they appear in the light of the results of investigations later and more comprehensive than are believed to be embodied in any accessible source of information.

Popular and Legal Sense of Term "Homestead."—The word "homestead" is used in two general senses. It has both a popular and a legal signification.[1] The term itself has been said to be nearly as old as the English language. But its use in legislation is quite modern, and is peculiarly American.[2] In its popular sense, the term signifies the place of the home—the residence of the family.[3]

The legal sense of the term "homestead" is the outcome of statutory regulation. Under well-known enactments known as "homestead laws," certain property, consisting primarily of real estate and viewed as a family residence, is exempt from execution or forced sale for debt, or in various jurisdictions and in varying degree, for other forms of liability. These laws, which exist in nearly all the states of the union, and are quite often passed in furtherance of special constitutional provisions, give to debtors a freedom from liability such as is not known in other lands.

Quite often the sense of the term "homestead" as used in the homestead laws is declared by the courts to be the same as its ordinary or legal sense.[4] Sometimes, however, a different scope of the legal sense is recognized.[5] Yet it should be evident that the legal sense is not the same as the popular sense, but includes it and modifies it. As the matter is put in one of the jurisdictions where the two senses had previously been declared to be the same, it is the actual homestead to which the homestead enactments refer and to which they purport to add certain legal incidents.[6] These incidents include, in the first place, exemption from enforced liability for ordinary debts at least. Furthermore, there are generally embraced such features as the selection or setting apart of the homestead from other property, usually by some form of declaration and recording, or by action of court; the restrictions on alienation or incumbrance of the homestead, usually calling for some distinct manifestation of assent on the part of the wife; and the prohibition of the abandonment of the homestead, except through some formal instrument or mode of proceeding. Finally, though by no means least in importance, comes the limiting, in varying measure, of the value or area of the homestead, or of the uses to which property sought to be placed under this exemption can be put.

Attempted Justification of Legal Adoption of Popular Sense.—A justification for the views of the courts identifying the legal with the popular sense of the term "homestead" may be found however, at least in some instances, in the fact that judges are considering, not so much the method of acquiring a homestead or of incumbering it or parting with it, as the extent of the homestead, in regard to the grounds and buildings included therein.

Another justification for such a view is sometimes sought to be found in the want of any prescribed definition of the term.[7] It detracts from the force of any such position,

[1] Reference to those two senses is made in Gregg v. Bostwick (1867), 33 Cal. 220, at p. 227, or 91 Am. Dec. 637, at p. 641; Estate of Delaney (1869), 37 Cal. 176, at p. 179; Kennedy v. Gloster (1893), 98 Cal. 143, at p. 147, or 32 Pac. Rep. 941, at p. 942.

[2] Harrison, J., delivering the opinion in Keyes v. Cyrus (1893), 100 Cal. 322, at p. 324, or 34 Pac. Rep. 722, at p. 723, or 38 Am. St. Rep. 296, at p. 298. See also, as to the modern and American character of the legislation, the remarks of Foster, J., speaking for the court in Barney v. Leeds (1871), 51 N. H. 253, at p. 261.

[3] Keyes v. Cyrus (1893), 100 Cal. 322, at p. 298, or 34 Pac. Rep. 722, at p. 723, or 38 Am. St. Rep. 296, at p. 298. It has further been said of the word "homestead" that it *ex vi termini* means the family seat or mansion. Turner v. Turner (1895), 107 Ala. 465, at p. 468, or 18 South. Rep. 210, or 54 Am. St. Rep. 110, at p. 112.

[4] Phelps v. Rooney (1859), 9 Wis. 70, at pp. 83-89, or 76 Am. Dec. 244, at pp. 246-50; Gregg v. Bostwick (1887), 33 Cal. 220, at p. 227, or 91 Am. Dec. 637, at p. 641; Estate of Delaney (1869), 37 Cal. 176, at p. 179; Kennedy v. Gloster (1893), 98 Cal. 143, at p. 147, or 32 Pac. Rep. 941, at p. 942; Tillotson v. Millard (1862), 7 Minn. 513, at p. 518, or 82 Am. Dec. 112; Kelly v. Baker (1865), 10 Minn. 154, at p. 156; Ferguson v. Kumler (1880), 27 Minn. 156, at p. 159, or 6 N. W. Rep. bottom p. 618, at p. 619. See also Tucker v. Kennisto (1867), 47 N. H. 267, at p. 270; Barney v. Leeds (1871), 51 N. H. 253, at p. 265.

[5] Walters v. People (1856), 18 Ill. 194, at pp. 198-99, or 65 Am. Dec. 730, at p. 733.

[6] Harrison, J.. delivering the opinion in Keyes v. Cyrus (1893), 100 Cal. 322, at p. 324, or 34 Pac. Rep. 722, at p. 723, or 38 Am. St. Rep. 296, at p. 298.

[7] As is in the case of Oliver v. Snowden (1882), 18 Fla. 823, at p. 836, or 43 Am. Rep. 338, at pp. 339-40.

however, that a like identification of the legal with the popular sense of the term is made in jurisdictions where the statute defines a homestead.

Claims Exempted as Determining What Constitutes a Homestead.—The especial object and vital idea of a homestead is that of protection from the claims of creditors.[8] Yet the term "homestead" does not necessarily imply exemption from all debts or claims. Various kinds of claims of creditors and particular species of liabilities are, in different jurisdictions, made or held good against the homestead. Courts have sometimes gone too far, however,[9] in declaring that a homestead not freed from particular claims of creditors is not a homestead at all.

Definitions and Characterizations of Term "Homestead."—The courts have given many descriptions of a homestead. Sometimes these have been evidently framed as definitions of the term "homestead;" sometimes they are strictly stated to be such; and sometimes they are mere characterizations of the scope of the term. In most instances, however, even those descriptions which may be regarded as definitions are too local in their character to serve as a general definition of the term. They frequently embody some feature upon which divergent views are entertained in different jurisdictions.[10] On this account they are of comparatively slight value in aiding the effort to formulate a broad, comprehensive definition, yet remain of importance as indicating the views of a homestead which are entertained in different localities.

Naturally, in seeking to group these various definitions and characterizations, we are struck, in the first place, with the fact that many of them more or less explicitly purport to follow the popular sense of the term; though, nevertheless, sometimes taking very different views, largely determined by local provisions or opinions, of the extent or character of the homestead, while others, on the other hand, manifest their departure from the popular sense of the term. In California, for example, the word "homestead" has been (except in a recent statement of the supreme court before quoted) considered to be used, both in the constitution and in the statute, in the ordinary or popular sense. As was said for the supreme court of that state by the late Judge Sanderson in an oft-quoted passage: "It represents the dwelling house at which the family reside, with the usual and customary appurtenances, including outbuildings of every kind necessary or convenient for family use, and lands used for the purposes thereof. If situated in the country, it may include a garden or farm. If situated in a city or town, it may include one or more lots, or one or more blocks. In either case, it is unlimited by extent merely. It need not be in a compact body; on the contrary, it may be intersected by highways, streets or alleys. Neither is it circumscribed by fences merely. In respect to quantity, by i self considered, it is unlimited, whether in town or country. In short, the only tests are use and value. The former is both abstract and statutory, the latter statutory only. Whatever is used—being either necessary or convenient—as a place of residence for the family, as contradistinguished from a place of business constitutes the homestead, subject to the statutory limits as to value."[11] In the same state it has been much more briefly said, in construing the statute, that the homestead is, and was, intended to be the place where the home is.[12]

[8] See the remarks of Chief Justice Champlin, speaking for the Supreme Court of Michigan, in Buckingham v. Buckingham (1890), 81 Mich. 89, at pp. 92-93, or 41 N. W. Rep. 504, at p. 505.

[9] As in Lamb v. Mason (1877), 50 Vt. 345, per Powers, J., for the court at p. 350.

[10] Thus they may involve the question whether or how far the homestead may consist of lands not contiguous, or to what extent landed property sought to be made to get the benefit of the homestead exemption may be used for business purposes.

[11] Gregg v. Bostwick (1867), 33 Cal. 220, at pp. 227-228, or 91 Am. Dec. 637, at pp. 641-42. This description is quoted or adopted in whole or part in Keyes v. Cyrus (1893), 100 Cal. 322, per Harriman, J., for the court, at p. 324, or 34 Pac. Rep. 722, at p. 723, or 38 Am. St. Rep. 296, at p. 298; Kennedy v. Gloster (1893), 98 Cal. 143, at p. 147, or 32 Pac. Rep. 941, at p. 942; Gaylord v. Place (1893), 98 Cal. 472, at p. 478, or 33 Pac. Rep. 484, at p. 486; dissenting opinion of Patterson, J., in Lubbock v. McMahon (1889), 82 Cal. 226, at p. 233, or 22 Pac. Rep. 1145, at p. 1148, or 16 Am. St. Rep. 108, at p. 113. McKinstry, J., in *In re* Crowey (1886), 71 Cal. 300, at p. 303, or 12 Pac. Rep. 230, at p. 231; Ham v. Santa Rosa Bank (1882), 62 Cal. 125, at pp. 134, 138-39, or 45 Am. Rep. 654; Estate of Delaney (1869), 37 Cal. 176; per Rhodes, J., for the court, at pp. 179-80; Oliver v. Snowden (1882), 18 Fla. 823, at p. 834, or 43 Am. Rep. 338-39.

[12] Laughlin v. Wright (1883), 63 Cal. 113, at pp. 116-17. Compare earlier like descriptions in Ackley v. Chamberlain (1860), 16 Cal. 181, at p. 183, or 76 Am. Dec. 517; Cook v. McChristian (1854), 4 Cal. 23, at pp. 26-27.

The more extended description has been substantially quoted in Florida to show the local statutory difference, because in the latter state the extent of the homestead is measured by quantity and not value.[13] Where, again, the statute, as in New Hampshire speaks of the "family homestead," this is interpreted in the light of the explanation of Coke, that the latter part of the word "homestead" means a place. It is accordingly declared that the homestead lacking those extensions or appurtenances recognized in California "means the home place; the place where the house is, and such is its legal acceptation at the present day. It is the home, the house, and the adjoining land where the head of the family dwells; the home farm."[14] A like view of the meaning of the term homestead has been taken in Alabama.[15] In Arkansas it is likewise declared that the "homestead is the place of a home or house. That part of a man's landed property which is about and contiguous to the dwelling house."[16] As is further said in that state: "A homestead necessarily includes the idea of a house for a residence or mansion house. The dwelling could be a splendid mansion, a cabin, or tent. If there be either it is under the protection of the law, but there must be a home residence upon it, and the land on which it is situated can be claimed as a homestead."[17] In Minnesota the word "homestead" is also used in the statute prior to the act of 1860 in its ordinary signification as conveying the idea of the place of residence or dwelling of its owner.[18]

The term includes, however, not only the ground upon which the dwelling house rests, but more; and how much more the statute defines,[19] though without restricting either the value of the homestead or the uses to which it is put,[20] and while merely placing upon the homestead the limit of area.[21] Where, however, the legislature confined the homestead exemption as in Illinois to the "lot of ground" and buildings occupied as a residence by the debtor, this has been held to show that it designedly narrowed the protection to less than what would be included in the more comprehensive signification of the term "homestead" as known under the Iowa act, and in general parlance.[22]

Explanation of Variations in Descriptions of Term.—Even in those jurisdictions in

[13] Oliver v. Snowden (1882), 18 Fla. 823, at pp. 834-35, or 43 Am. Rep. 338-39.

[14] Hoitt v. Webb (1858), 36 N. H. 158, per Eastman, J., for the court, at p. 166. Compare the more or less similar statements made by Clark, J., for the court in Currier v. Woodward (1882), 62 N. H. 63, at p. 64; by Foster, J., for the court, in Barney v. Leeds (1871), 51 N. H. 253, at p. 265; by Bellows, J., for the court, in Tucker v. Kenniston, 47 N. H. 267, at p. 269, or 93 Am. Dec. 425, at p. 428; by Doe, J., for the court, in Austin v. Stanley (1865), 46 N. H. 51, at p. 52; and by Richardson, C. J., for the court in Woodman v. Lane (1854), 7 N. H. 241, at p. 245.

[15] Jaffrey v. McGough (1889), 88 Ala. 648, per Somerville, J., at p. 650, or 7 South. Rep. 333, at p. 334.

[16] Tomlinson v. Swinney (1860), 22 Ark. 400, at p. 403, or 76 Am. Dec. 432, at p. 434. This definition is quoted or adopted in Williams v. Dorris (1876), 31 Ark. 466, at p. 468; McCloy v. Arnett (1886), 47 Ark. 445, at p. 453, or 2 S. W. Rep. 71, at p. 74; McCrosky v. Walker (1892), 65 Ark. 303, at p. 305, or 18 S. W. Rep. 169; Fillar v. Rass (1893), 57 Ark. 179, at p. 181, or 21 S. W. Rep. 34, at p. 35; dissenting opinion of Battle, J., in Merrill v. Harris (1898), 65 Ark. 355, at p. 359, or 46 S. W. Rep. 538, at p. 540, or 41 L. R. A. 714, at p. 716.

[17] Chief Justice English delivering the opinion in Williams v. Dorris (1876), 31 Ark. 466, at p. 468. This language is quoted by Judge Battle, delivering the opinion in Tillar v. Bass (1893), 57 Ark. 179, at p. 181, or 21 S. W. Rep. 34, at p. 35, and in his dissenting opinion in Merrill v. Harris (1898), 65 Ark. 355, at p. 359, or 46 S. W. Rep. 538, at p. 540, or 41 L. R. A. 714, at p. 716. The same chief justice had, however, in Tomlinson v. Swinney (1860), 22 Ark. 400, at p. 404, or 76 Am. Dec. 432, at p. 434, quoted somewhat different language from the opinion of Chief Justice Hemphill in Franklin v. Coffee (1857), 18 Tex. 413, at p. 416, or 70 Am. Dec. 292, at p. 293; and had made an explanation which may be regarded as impliedly deriving support from the cited case of Johnston v. Turner (1874), 29 Ark. 280-293, especially at p. 291, and which essentially follows the Iowa doctrine, also adopted in various other jurisdictions, that occupancy, the use by the family as a homestead, are essential requirements to impress the property with the character of a homestead, and that a mere intention to occupy, though subsequently carried out, is not sufficient.

[18] Kelly v. Baker (1865), 10 Minn. 154, at p. 156. See also to like effect: Tillotson v. Millard (1862), 7 Minn. 513, at p. 518, or 82 Am. Dec. 112; Kresin v. Man (1870), 15 Minn. 116, at p. 118; Ferguson v. Kumler (1880), 27 Minn. 156, at p. 159, or 6 N. W. Rep. bottom p. 618, at 619.

[19] Berry, J., speaking for the court in the case just cited, of Kelly v. Baker (1865), 10 Minn. 154, at p. 156.

[20] Nat. Bank v. Banholzer (1897), 69 Minn. 24, at p. 25, or 71 N. W. Rep. 919. See Jacoby v. Parkland Distilling Co. (1889), 41 Minn. 227, at pp. 230-31, or 43 N. W. Rep. 52, at p. 53; also as to the use, Windland v. Halcombe (1879), 26 Minn. 286, at pp. 287-88, or 3 N. W. Rep. 341, at pp. 342-43.

[21] Nat. Bank v. Banholzer, just cited.

[22] Walters v. People (1856), 18 Ill. 194, at pp. 197-99, or 65 Am. Dec. 730, at pp. 732-33. At a much later period, however, in the same state, the supreme court in construing the term "homestead" in a will adopted the more comprehensive definition of a leading legal lexicographer. Smith v. Dawris (1896), 163 Ill. 631, at p. 635, or 45 N. E. Rep. 267, at p. 269.

which the popular sense of the term "homestead" is more or less explicitly followed, it cannot escape observation that very different views of the extent of the homestead are sometimes taken.[23] The view which is to be taken in regard to what is meant by the term "homestead" and embraced therein, as such term is used in the statute or organic law seems further to be sometimes deemed dependent upon the policy and purpose of such law. If that be, for example, to preserve the claimant's usual means of employment, the property included in the homestead may cover a sawmill adjoining the dwelling of a lumberman.[24] The scope of the term "homestead" may likewise be determined by statutory requirements like those pertaining to selection and residence.[25]

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[23] The contrast is especially manifest between the liberal view taken in California and the restricted view taken in New Hampshire in the descriptions of a homestead just quoted.

[24] This is the view taken of the Florida constitution of 1868 in Greeley v. Scott (1875), 2 Woods (U. S.), 657, at pp. 658-61.

[25] See Gallagher v. Smiley (1889), 28 Neb. 189, at pp. 194-95, or 44 N. W. Rep. 187, at p. 189, or 26 Am St. Rep. 319, at p. 323.

BANKRUPTCY—ACCOMMODATION MAKERS OF NOTES AS CREDITORS.

SWARTS v. SIEGEL.

Circuit Court, E. D. of Missouri, May 3, 1902.

Bankr. Act, § 60a, provides that "a person shall be deemed to have given a preference if, being insolvent, he has * * * made a transfer of any of his property and the effect of the enforcement of such * * * transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors." Held, that an accommodation maker on a note executed by a bankrupt was not in any sense a creditor of the bankrupt, where he had not been called on to pay the note, or any part thereof, and could not be deemed to have received a preference merely because the bankrupt had, within four months of the adjudication, paid the amount of the note to the payee.

ADAMS, D. J.: This is a demurrer to a complaint in an action at law instituted by the plaintiff, as trustee of the estate of Siegel-Hillman Dry Goods Company, in bankruptcy, against Ferdinand Siegel and Joseph Siegel. The complaint charges, in substance, that the bankrupt corporation was indebted to the Corn Exchange Bank of New York upon divers notes, aggregating the sum of $20,000; that these notes were signed by the bankrupt and by the defendants as co-makers, and, so signed, were delivered to the Corn Exchange Bank in settlement of the indebtedness of the bankrupt corporation; that the defendants were mere accommodation makers for the bankrupt; that, within four months before filing of a petition in bankruptcy against the corporation, it, while insolvent, paid the Corn Exchange Bank the amount due on the notes. There is an allegation that the bankrupt, at the time of making the payments to the bank, intended that the same should operate as a preference to the defendants. The legal conclusion is then pleaded that the payments so made were made for the benefit of the defendants, and operated to give them a preference, and were so intended by the bankrupt, and that the defendants at the time of receiving such preference had reasonable cause to believe that by such payments to the bank it was intended to give them a preference, within the meaning of section 60b of the bankruptcy act. This suit was accordingly brought to recover from the defendants the amount so paid by the bankrupt to the Corn Exchange Bank.

Stripped of verbiage, the question presented, as I understand it, is whether the payment by an insolvent debtor, within four months of bankruptcy, of notes on which the debtor is liable as principal, entitled the trustee of his estate in bankruptcy to recover the amount of payments so made to the creditor, from an accommodation maker of the notes, who was jointly liable to the creditor for their payment, but who neither participated in, nor knew of, the payment when made to the creditor, on the sole ground that the necessary result of such payment was to relieve the accommodation maker from his obligation to pay the same. Section 60a of the bankruptcy act defines a preference thus: "A person shall be deemed to have given a preference if, being insolvent, he has * * * made a transfer of any of his property and the effect of the enforcement of such * * * transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class." The important and essential element of a preference is that a creditor of the bankrupt must have obtained a greater percentage of his debt than any other of such creditors. Subdivision "b" of section 60 provides for recovering preferences from the persons who have received them. It is as follows: "If a bankrupt shall have given a preference within four months before the filing of the petition, * * * and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person."

It is not contended in this case that the person actually receiving the preference, or his agent acting therein, is liable for the same; but it is contended that the persons "benefited thereby," namely, the accommodation makers, have received a preference, and are therefore liable to

restore the same to the trustee in bankruptcy. I am unable to agree with plaintiff's counsel in their contention that the accommodation maker of a note, before he is called upon to pay the same, is in any sense a creditor of the principal debtor, within the meaning of the bankruptcy act, until he has paid the obligatfon, or some part of it, for which he has become surety for the debtor. He has no claim or demand against the principal in the note, and certainly he has none provable in bankruptcy. This, I think, is the necessary meaning of section 57, subd. "i" of the bankruptcy act. It is as follows: "Whenever a creditor whose claim against a bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part, he shall be subrogated to that extent to the rights of the creditor." In other words, an accommodation maker must discharge the undertaking, in whole or in part, before he can be subrogated to the rights of the creditor. Until he discharges such undertaking in whole or in part, the principal debtor owes him nothing; and he cannot, within the purview of the bankruptcy act, occupy the attitude or assert any rights of a creditor against the estate of the bankrupt. If such is the case, he clearly ought not to be subjected to the obligations imposed upon creditors, as such, in other provisions of the act.

From the foregoing legislative construction, as well as from common learning with respect to the nature of the contract and obligation of a surety, I conclude that no liability can rest against these defendants on the ground that they, as creditors of the bankrupt corporation, have received a preference from the corporation.

The foregoing conclusion might dispose of the demurrer under consideration, as the theory of the complaint undoubtedly is that the defendants occupied such a position with respect to the bankrupt that they, as creditors of the bankrupt, had received a preference, within the meaning of section 60, *supra*, by reason of the payment made to the Corn Exchange Bank. But the argument took wider scope, and was based largely upon the following proposition: That a transfer of property to "any one" of the creditors might be recovered back, not alone from the creditor who received the transfer, but from any other person who might have been incidentally "benefited thereby." This contention necessarily requires a construction to be placed upon the language employed in section 60, subd. "b." As I understand the provisions of the bankruptcy act (section 60a, *supra*), it is only a creditor of the bankrupt who may receive any preference. The act, in all its provisions, clearly contemplates this. Section 60a, in defining what a preference is, in substance says that it must enable one creditor to get a greater percentage of his debt than any other creditor of the same class. Section 57, subd. "g," dealing with the same subject, provides as follows: "The claims of creditors who have received preferences shall not be allowed," etc. Section 60, subd. "c," in language, provides "that if a creditor has been preferred, and afterwards in good faith gives the debtor further credit," etc. All of these sections, taken together, to my mind clearly indicate that congress intended to limit the class of persons to whom preferences might be made to creditors of a bankrupt only. Section 60, subd. "b," neither changes the elements of a preference as defined by subd. "a," nor does it enlarge the class which may be preferred. It simply provides for the recovery of the preferential payments from a person who may have been preferred, and is predicated upon the existence of a preference as defined in the preceeding subdivision. It superadds, however, as a condition to the right of recovery, knowledge, or, rather, reasonable cause to believe, on the part of the recipient of a preference, that the payment to him was intended by the bankrupt to be such a preference. The language relied upon by plaintiff's counsel as enlarging the class of recipients of preferences so as to include accommodation makers or indorsers of the bankrupt's paper, before legal liability is fixed against them, is as follows: "If a bankrupt shall have given a preference [as defined in subdivision "a"], and the person receiving it or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person." The language thus employed does not in terms purport to enlarge the class which might be the recipients of unlawful preferences. That matter is fixed and determined in the preceding section. "*If * * * the person receiving it or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe*," etc. This language seems to have been employed for the purpose of subjecting any creditor, who may have received or been benefited by a preference, to liability for return of preferential payments,—not if he who actually or manually received it alone had knowledge that a preference was intended, but if he or any one else acting for him had such knowledge. The words underscored above, instead of enlarging the class of recipients of unlawful preferences, seem to have been inserted, *ex industria*, to bind any creditor who may have received such preference to any knowledge which his agents had of the bankrupt's intention, and were intended to impute that knowledge to the benefited creditor himself. The final words of the section, which provide for recovering the amount of the preferential payment from "such person," obviously refer to such person as might, under the law, have received a preference, and who either actually received it, or was benefited thereby, namely, a creditor of the bankrupt.

The foregoing, in my opinion, presents a correct analysis, and shows the true meaning of the sections of the law in question. To hold that an ac-

commodation maker of the commercial paper of a bankrupt, against whom no liability was fixed, and who was at the time of the institution of the proceedings in bankruptcy in no manner a creditor of the bankrupt, and who never became such, was so incidentally benefited by the payment of the notes by the principal debtor, with which he had nothing to do, and which he could not prevent, as to subject him to liability to the trustee because of such payment, would, in my opinion, be an unwarranted perversion of the provisions of the bankruptcy act. It would eliminate all those carefully inserted provisions qualifying and defining what is a preference within the meaning of the act, and would work a palpable injustice.

Without analyzing the provisions of the act of 1867, it is at once observed that their scope with respect to preferences is much broader than is found in the act of 1898. The class who might have received a preference is not, in terms, limited to creditors, but specifically comprehends any person who is under any liability for the bankrupt. Any payment or transfer of money or property by an insolvent with the intent to give a preference to his creditors, or "to any person or persons who are or may be liable for him as indorsers, bail, sureties or otherwise," or with intent "to defeat or delay the operation of the act," was by section 39 made an act of bankruptcy, and, by the same section, entitled the assignee to recover the amount thereof. The particular features to which I wish to attract attention are those which contemplate, in direct and positive terms, the contingency of preferences being given to persons under any liability for the bankrupt, or to persons liable for him as indorsers, bail, sureties, or otherwise, and also to that provision permitting recovery from the persons receiving preferences when the same were made in fraud of the provisions of the act. There were certain adjudications under the act of 1867 holding, in substance and effect, that, even under the broad and comprehensive provisions of that act, recovery could not be had against an indorser or surety under facts and circumstances similar to those involved in the present case. In the case of Thomas v. Woodbury, Fed. Cas. No. 13,916, it was held by the United States district court of Maine (Fox, J.), that the payee and indorser of a note paid by the insolvent maker to the holder, in the usual course of business, within four months of bankruptcy of the maker, was not chargeable with taking or receiving a preference, where the indorser neither received the money, nor actually procured, suggested, or aided its payment, even though he knew the maker was insolvent. To the same effect, also, is the case of Singer v. Sloan, Fed. Cas. No. 12,899, decided by this court (Treat, J.). So far as I am aware, in all cases decided by the district courts under the act of 1867, in which an indorser was held liable to restore money to the assignee in bankruptcy, it was because he had actively procured the payment to be made, or actively participated in the receipt of the money or property from the bankrupt's estate in such a way and manner as to constitute a fraud upon the provisions of the bankruptcy act. Such is the effect of the following cases: Ahl v. Thorner, Fed. Cas. No. 103; Sill v. Solberg (C. C.) 6 Fed. Rep. 468; Scammon v. Cole, Fed. Cas. No. 12,432; *Id.* 12,433; Cookingham v. Morgan, Fed. Cas. No. 3,183. Accordingly I think it may be safely said that even though the cases relied upon by plaintiff's counsel might have been authority for holding an indorser or surety to liability under the act of 1867, whereby a transfer to any person under liability for the bankrupt, as indorser, bail, surety, or otherwise, in known fraud of the act, might be recovered from the person receiving it or to be benefited by it, they afford no authority for recovery against such person under the present bankruptcy act, which contains no provision in terms avoiding the preference to the person under liability for the bankrupt, such as indorser or surety, and which contains no provision for recovery of money paid in known fraud of the act. Moreover, I am persuaded that congress, by eliminating the provisions just referred to from the present act, and doing so with full knowledge of all the provisions of the act of 1867, manifested a clear intention not to subject indorsers or sureties to the liability now sought to be enforced against them under the facts of the present case. The present bankruptcy act, as is well known, was distinctly a compromise measure. For a long time before its enactment, congress had under consideration bills and amendments relating to bankruptcy legislation. They had for years received critical consideration in congress, and after much discussion there, and much general public debate, the present act became a law. Its provisions in relation to preferences, and the right of recovery of the same from a creditor only, must be treated, in the light of the former more drastic act, and in the light of the facts just alluded to, as the deliberate expression of the legislative will: and accordingly no interpretation should be put upon the same which would impute uncertainty to the legislative mind on this subject, and certainly no interpretation ought to be indulged which would embody in the present act any of the provisions of the act of 1867 industriously omitted by congress.

Attention is called by counsel for plaintiff to the case of Bartholow v. Bean, 18 Wall. 635, 21 L. Ed. 865, and it is claimed that that case is controlling of the one now before the court. A careful consideration of it, however, convinces me that it has no applicability. The point in judgment in that case was whether the fact that a creditor who received payment of his debt at a time and under circumstances constituting a preference, within the meaning of sections 35 and 39 of the act of 1867, could escape liability therefor on the sole ground that there was an indorser on his paper, against whom liability was fixed. It was contended by the defendant that he was com-

pelled to receive payment when tendered by the principal debtor, or lose recourse over against the indorser, and for that reason that he was not liable to return the preference to the assignee in bankruptcy. The suit against Bartholow was based on the charge that he had received a preference, and had received money in fraud of the bankruptcy act. The court held that a refusal of payment by the creditor under such circumstances would not have discharged the indorser, and that was the only question in judgment. In the opinion, however, the court took occasion to say: "The statute, in express terms, forbids such preference, not only to an ordinary creditor of the bankrupt, but to any person who is under any liability for him; and it not only forbids payment but it forbids any transfer or pledge of property as security to indemnify such persons. It is, therefore, very evident that the statute did not intend to place an indorser or other surety in any better position in this regard than the principal creditor, and that, if the payment in the case before us had been made to the indorser, it would have been recoverable by the assignee." So far, it seems to me, the court based its observation upon that peculiar provision of the act of 1867 forbidding preferences to any person who is under any liability for the debtor; but the court goes on as follows: "If the indorser had paid the note, as he was legally bound to do, when it fell due, or at any time afterwards, and then received the amount of the bankrupt, it could certainly have been recovered of him." Such is undoubtedly true both under the old law and the present law, because, under such circumstances as are disclosed in the case, the indorser would have been the creditor of the bankrupt. The court then goes on as follows: "Or if the money had been paid to him directly, instead of the holder of the dote, it could have been recovered, or if the money or other property had been placed in his hand to meet the note, or to secure him, instead of paying it to the bankers, he would have been liable." In the last-mentioned observation the court in its hypothesis makes the indorser an active participant in securing the payment of the debt in order to relieve him from liability; and accordingly, under the provision of the act of 1837, he was liable, because he was a person under liability for the bankrupt, who had received a preference by receiving an amount of money insufficient to exonerate him from liability. I fail to find in this decision anything whatever which disturbs the conclusion hereinbefore reached in the present case. The court there was dealing with a case under a different statute, invoking a different provision from the one now found in the present bankruptcy act, and, in its hypothetical cases, assuming a state of active participation by the indorser, resulting in a direct pecuniary benefit to him. The conclusion reached by the Supreme Court of Rhode Island in the recent case of Landry v. Andrews, 6 Am. Bankr. R. 281, 48 Atl. Rep. 1033, relied upon by plaintiff's counsel, was not the result of any independent reasoning by that court, but was based upon what is, in my opinion, improperly interpreted Bartholow v. Bean, *supra*, to teach, and therefore has no persuasive influence. For the reasons hereinbefore given, the demurrer must be sustained.

NOTE.—*Whether an Indorser on a Note is a "Creditor" Within the Meaning of the Bankrupt Act as to Preferences.*—Where a bankrupt is liable on a note indorsed by a third party, is it a preference either to the holder or the indorser of the note for him to pay the note within four months of bankruptcy? This question is said by Justice Miller to be one "not without difficulty." Bartholow v. Bean, 16 Wall. (U. S.) 635. In that case the bankrupt was indebted on a note indorsed by one "W," who was solvent and who had waived protest. The defendant, who was the holder of the note, demanded and received payment of the note from the maker, whom the defendant knew to be insolvent at the time. Within four months the maker was adjudged a bankrupt, and plaintiff, who was appointed trustee, brought this suit to recover from the defendant, the holder of the note, the amount that had been paid thereon. The defendant set up in defense that in order to hold the indorser he had to demand payment from the maker even if he knew him to be insolvent. The court held, however, that a payment by an insolvent, which would otherwise be void as a preference under sections 35 and 39 of the Bankrupt Law of 1867, is not excepted out of the provisions of those sections because it was made to the holder of his note over due, on which there was a solvent indorser whose liability was already fixed. The court said: "If it were a transaction solely between the bankrupt and the holder there seems to be no doubt that the payment was such a preference as would enable the assignee to recover it back. But the case is not a little embarrassed by the fact that the indorser, W, was solvent, and was liable on the note; and the question arises, whether, under such circumstances, they were at liberty to refuse to receive payment of the principal without losing their claim upon the indorser, who was probably a mere accomodation surety. * * * The statute in express terms forbids such preference, not only to an ordinary creditor of the bankrupt, but to any person *who is under any liability for him;* and it not only forbids payment, but it forbids any transfer or pledge of property as security to indemnify such persons. It is, therefore, very evident that the statute did not intend to place an indorser or other surety in any better position in this regard than the principal creditor." The court further held that the fact that the holder of a note neglected to demand payment of a note from an insolvent would not be a defense to a suit against the bankrupt. The *italics* in the quotation just given are by the writer and are intended to call attention to the distinction in regard to who are creditors between the provisions of the bankrupt law of 1867 and that of 1898 concerning the recovery of illegal preferences.

Another case, arising under the new bankrupt act, is that of Landry v. Andrews (R. I. 1901), 48 Atl. Rep. 1036, 6 Am. B. Rep. 281. In that case the facts were exactly the same as in the case of Bartholow v. Bean, *supra*, with the exception that in this case the trustee sues the indorser instead of the holder, for the reason that the indorser and not the holder had knowledge or had reason to believe that the payment made by the insolvent maker was intended as a preference. The

court held that the amount of a note paid by an insolvent debtor at the request of an indorser who had reasonable cause to believe that it was intended thereby to give him a preference over other creditors constitutes a preference under section 60b, and may be recovered from the indorser from the trustee in bankruptcy. The court relied upon the cases of Bartholow v. Bean, *supra*, and also that of Ahl v. Thorner, 3 N. B. R, 118, Fed. Cas. No. 103, where the court permitted a recovery against the indorser because "he was the party *to be benefited* by the payment." The italicized words will show that the ground of this last mentioned decision, although decided under the provisions of the act of 1867, would bring it easily with the provisions of sec. 60b of the act of 1898.

The above, together with those cited in the principal case, are the only important authorities on this very interesting and important question. Under the weight of authority so far, it would seem that if an insolvent maker pays a note within four months of bankruptcy, his trustee can recover back the payment either from the holder to whom the payment was made, or from the indorser, for whom it was made. Whether he shall sue one or the other depends on which of them had knowledge or reason to believe that the payment was intended as a preference. The opinion of the court in the principal case, however, is calculated to shake the authority of these cases, at least so far as they relate to the recovery of a payment to the holder of a note from an indorser who has not sought or actively solicited the preference.

JETSAM AND FLOTSAM.

LEGAL CONDITIONS IN THE PHILIPPINES.

Laws and legal procedure in the Philippines at this present writing are in a chaotic condition. The civil code recently introduced by the commission leaves the existing law partly Spanish, partly American—a sort of legal hotch-potch resulting from the blending of the dual systems. The new code is engrafted on the ancient Filipino-Spanish law, the former being essentially in character similar to the system of the code states. Only a partial change is effected, however, the mass of the Spanish law still being in force, reference being made to it by sections in the new code. The present system is as a new cloth on an old garment, the garment being patched with a piece of new cloth and the rent made worse.

The criminal law has been unmodified by the commission, with the exception of the justice of the peace practice and procedure. An attempt was made, however, to introduce the essential principles of the English common law by General Otis as early as May, 1899, which well-meant effort served to make "confusion worse confounded," as may have been expected from any attempt of the military authorities to tamper with the civil laws.

The practice is likely to be far more erratic than the law. The dissimilarity is hardly greater between the Spanish language and the English speech than between the two systems of jurisprudence. Not only are the legal systems different, but the mode of reasoning, the habits of thought, the manner of court procedure heretofore prevailing in this county and that introduced by and prevailing in the United States, are totally unlike. This is more specially true as regards pleading and evidence. Native judges on the bench and native attorneys at the bar are likely to be as helpless as children when American lawyers represent one side of the case in dispute.

The prosecuting attorneys, or, as they are termed here, "provincial fiscals," are in every instance native lawyers, as also are some of the judges of the courts of first instance (district courts). Where judge and fiscal are both natives the administration of the criminal law is almost unavoidably a dismal failure, especially in cases where one side, the defense, is conducted by a competent American attorney, in which, even though a conviction is secured in the lower court, error is almost certain to be committed in rulings on evidence which will cause a reversal in the supreme court.

In the district court of this island, presided over by the American judge, of the several hundred criminal cases pending at the time he took charge, the most important in its public influence is what is known as the Cadiz Neuva cases, there being a group of cases all growing out of the same transaction, which was the robbery of 7,000 pesos belonging to several Chinamen. The money was taken from a lorcha, where it had been deposited shortly before the theft. The vessel lay off the little pueblo of Cadez Neuva, a large proportion of the principal inhabitants, including the officials, being implicated in the crime, or at least accused as accomplices. Charges are preferred against certain defendants for furnishing cariboo to take away the treasure, others are charged with permitting the robbers to avail themselves of the shelter of their houses after the commission of the crime. There are fifteen different charges and thirty-seven defendants. The party against whom the principal force of the fiscal and a private prosecutor is chiefly directed was at the time of the robbery a municipal official, who is accused of pretending to act as a detective in following up the gang and then receiving $700 as a share of the booty.

The prosecution of Lucas, though earnestly desired by both government and private prosecutor, was closed, as they seemed to suppose triumphantly by showing that the defendant had received from Luciano, the chief of the robber gang, a sum of money, which one of the government witnesses testified that he saw paid. There was no evidence that the money ever formed part of the stolen treasure or belonged to the Chinamen. Not proposing to see the case go by default the judge informed the fiscal that it would be necessary to prove the connection between the money received by Lucas and the stolen funds. The reply of the fiscal was that such connection had been proven in the case of Juan Tiempo, said Tiempo being one of the defendants whose case had been just before tried. The court, not being willing that the case should go entirely by default, more especially as there was a very strong probability of the defendant's guilt, and that he was morally the worst malefactor participating in the crime, suggested that under the American law it was essential that each case be proven independently of all others. The fiscal recommenced the case and called further witnesses, proceeded with the trial, leaving the testimony, however, in a very unsatisfactory condition. Notwithstanding the instruction given by the judge, in summing up the case the fiscal commented on certain facts not proven.

"Where is the evidence of such fact?" demanded the American attorney for the defense.

"It was proven in the case of Juan Tiempo," replied the fiscal.

The Spanish-Filipino law was made for the lawyers rather than for the benefit of the people. In fact the latter seem to have been ground fine between the upper and lower millstones of a grasping bar and iniquitous bench. A disputed attorney's fee was not submitted to the regular procedure of the courts for

determination; but, as was provided by the Spanish law, to the arbitration of a special board, composed of two of the practicing lawyers of that particular community, from whose decision there was no appeal. Such provision of the law requires no comment; its mere repetition is the most graphic illustration of the legal conditions in this island up to the recent passage of the present judicial act.

There was, of course, no jury under the pre-existing law. There is none provided for under the present system, but an attempt is made to introduce what may be considered the germ of the jury by the provision for two assessors to sit with the judge in civil cases, at the request of either litigant, whose duty it is to advise with the judge as to matters of fact. In case both assessors disagree with the judge in the decision of the case their dissent may be taken to the supreme court, who will give it whatever weight they may see fit in the final determination of the matter.

The new code provides that the Spanish shall be the language of the courts until the year 1906, after which English shall be the court language. This provision of the code touches upon a matter of exceeding great importance to the people of the United States. Language is the great nationalizer, the leaven that leavens the whole social mass. The language of the American people has been introduced into the schools. Why not into the courts of the country? After the year 1906 the language of the nation will be the language of the courts of justice; until then, during the next five years, the formative period of the Filipino race, the Castillian will be the tongue of the courts, while in the schools every effort will be made to teach the children the English language. Why for these all important five years should the language of the courts be that of one of the Latin nations of Europe? The Filipinos are waiting for the introduction of a civilized tongue. Thus far they have none. While many talk Spanish to a limited extent many do not understand the Spanish language, and all, or nearly all, among themselves, as their chosen speech, talk the native dialect. Before the American court of this province of western Negros the testimony of the witnesses is given in Visayan. I do not recall a single native witness who in giving testimony spoke in Spanish. By law a Spanish interpreter is provided for the courts of first instance, presided over by American judges. As an actual fact two interpreters are required, as the testimony of the witness is filtered first through the Spanish Visayan then through the interpreter to the English-speaking judge.

The pleadings under the former system are very dissimilar from those prescribed by the code and in vogue in the United States. The Filipino or Spanish lawyer sat down and wrote a detailed statement of the transaction, commingling promiscuously matters of fact and of evidence. In a criminal case the pleader would state what was done, how it was done, who was suspected of doing it, who could give information as to the perpetrators of the deed or deeds, as any number of acts would be set forth in the same charge. Perhaps the motive or what was supposed to be the motive for the commission of the crime, would be set forth, or anything bearing any relation to the transaction. The story thus set forth more or less voluminously, with its embellishments, would constitute the information on which the accused would be brought to trial.

In describing the fight of the Archangel from hell, Milton pictures his passage through the land of Chaos and Night—the region of light and dark, heat and cold, moist and dry; the lumber room of the universe, where indescribable confusion are the elements from which are created the worlds and all the elementary atoms strive for mastery in continual agitation and never ending "confusion worse confounded." The great poet's description fitly applies to the present condition of legal procedure in the Philippine islands, where English and Spanish, Anglo-Saxon and Latin, the code of the American states and the laws of continental Europe, the American, Spanish and Filipino lawyer and strive for supremacy. And the new American and old Spanish systems of law merge into each other, so that no man can tell where the one ends or the other begins.

W. F. NORRIS.
Judge Special Court First Instance for Island of Negros.

CORRESPONDENCE.

To the Editor of the Central Law Journal:

The following should be noted: In 55 Cent. L. J., No. 6, p. 106, the reference to "The Court of Appeals of the District of Columbia" in connection with the citation of Flannery v. R. R. Co., 4 Mackey, 111 (1885), should be to the Supreme Court of the District of Columbia, which, in general term, decided the Flannery case. The court of appeals of this district was organized in 1893, and is wholly distinct from the supreme court. It is the intermediate appellate court between the supreme court of the District of Columbia and the Supreme Court of the United States. The act of Congress which created the court of appeals abolished the appellate jurisdiction of the supreme court of the district in general term. In 55 Cent. L. J., No. 7, pp. 126, 127, the case of Roberson v. Rochester Folding Box Co., 65 N. Y. Supp. 1109, is referred to at some length. The trial court granted an injunction. 32 Misc. Rep. 344. This decision was unanimously affirmed by the appellate division. 64 App. Div. Rep. 30. The court of appeals, on June 27, 1902, *reversed* the decree. The case in the Court of Appeals of New York is reported in the N. Y. Law Journal of July 8, 1902. The reversal is for want of jurisdiction of equity. Three judges dissented—Gray, Bartlett and Haight.

In 55 Cent. L. J. No. 7, pp. 127, 133, as bearing upon the question of the burden of proof of survivorship in event of death by common disaster, the case of Faul v. Hulick, 18 App. D. C. 1901, may be noted, in which the Court of Appeals of the District of Columbia held that where a testratrix, bequeathes her estate to her son, and provides that if she shall survive him it shall go to an alternative beneficiary, and both perish in the same shipwreck (loss of S. S. Elbe), the death of the son is a condition precedent to the vesting of the bequest over, and the burden of proof of the prior death of the son is upon the alternative legatee, who will not take unless such burden be discharged; and that, as between the next of kin of the testratrix, in such a case, and the personal representatives of the son, as the testament vests the estate in the son immediately upon the death of the testatrix, the former's representatives have a *prima facie* right to take, and will do so in the absence of proof of the survivorship of the testatrix. The court also repeats the familiar rule that the common law, unlike the Roman law and the modern law of some countries and states derived and adopted therefrom, indulges no presumption of survivorship in the event of death in a common disaster, whatever may have been the age, sex or physical condition of the respective per-

sons who perished, but it requires evidence of survivorship as the basis of its action. The case involved the distribution of the sum of $15,000 in money in the hands of the testatrix's administrators, *c. t. a.*, which fund the trial court awarded to the alternative legatee, but the decree was reversed by the appellate court, which held that the fund should go to the son's representatives for want of evidence by the alternative legatee of the testatrix's survivorship. The court cites, *inter alia*, the case of Cowman v. Rodgers, 73 Md. 403, in support of its conclusion. Of course, the distinction made between cases of this class and those involving the proceeds of straight life insurance policies is not overlooked.

THOMAS M. FIELDS.

Washington, D. C.

HUMORS OF THE LAW.

Lord Norbury once said. "When I read the interminable sentences of some authors, I begin to feel that their readers are in danger of being 'sentenced to death.'"

One of the local justices of the peace of Missouri is an oddity. Among his set of rules governing practice before him is the following:

9. "Please don't ask me to take a drink during business hours. I can't go and I do not want to get into the bad habit of refusing."

An anecdote is told of a judge of the Missouri supreme court which is thought worthy of repetition.

One Mr. Gregor had been newly elected prosecuting attorney of —— county. Among his subordinates was a negro deputy constable, black as the proverbial ace of spades, who, but recently appointed, was full of official zeal. A few days after his appointment he came to McGregor with his eyes bulging out and told of his having the night before arrested a man and woman in a room in a certain house, who were found together in very compromising circumstances. Thereupon McGregor informed the zealous official that one act of that nature, standing alone, did not make a crime under the laws of Missouri.

Then the deputy asked:

"Boss, who writ dat law?" And on being told Judge S, and that it was to be found in State v. Chandler, 135 Mo. 155, replied:

"Boss, I ain't surprised Jedge S writ dat law; he ain't home much !"

THE WATER CURE.

One of the Harvard law students in the first issue of the *Brief*, a paper published by the students, writes very interestingly on the law as relating to the "Water Cure" in the Philippines. On this subject the author says: "Lord Ellenborough, in discussing this, said: 'The defendant, as we understand the procedure under the code, was first filled with water and then pressed upon the stomach, *vi et armis* (usually a musket). The burden thus having been cast upon the defendant was equitably distributed by the revised laws of hydrostatics. The presence of minnows in the water used is absolutely irrelevant, for *de minimis non curat lex*. Further than this we do not care to go. But it is submitted (a) that water is not an intoxicant; (b) that this was a case of maritime law anyway; (c) that he was nothing Moro less than a Filipino; (d) that curfew shall not ring to-night.' And so the —— law stands to-day.'"

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ACCOUNT—Equity.—Where there is no basis for a recovery until an accounting has been had, a suit in equity will lie.—Lee v. Washburn, 75 N. Y. Supp. 424.

2. ADVERSE POSSESSION—Sale by Executrix.—Adverse possession cannot be set up by purchaser from trustee under defective power, while some of the beneficiaries are miners.—Hunter v. Hunter, S. Car., 41 S. E. Rep. 33.

3. APPEAL—Findings of Court.—A finding which is a conclusion dependent upon many facts found will not be sustained on appeal, if the detailed facts do not support it.—Chester v. Buffalo Car Mfg. Co., 75 N. Y. Supp. 428.

4. APPEAL AND ERROR—Alimony Pendente Lite.—Whether the original order for alimony *pendente lite* was revoked by subsequent proceedings cannot be considered on appeal, the question not having been raised below.—Cushing v. Cushing, Mass., 63 N. E. Rep. 427.

5. APPEAL AND ERROR—Election of Remedies.—Where the court erroneously requires a party to elect between his motion for a new trial and to set aside judgment, an election will prevent him from afterwards complaining that the court erred in requiring him to elect.—Morris v. Wofford, Ga., 41 S. E. Rep. 56.

6. APPEAL AND ERROR — Excessive Attorney's Fees.—Where the court refused allow plaintiff to write off excessive attorney's fees, and defendant brings error, the supreme court will affirm the verdict, with direction that the attorney's fees be written off.—Cramer v. Huff, Ga., 41 S. E. Rep. 57.

7. APPEAL AND ERROR—Expenses of Caveat.—An administratrix *pendente lite* cannot appeal from an order directing that property passing to testator's husband under the law should not be charged with expenses of a *caveat* contest, since she has no interest in the subject.—Grabill v. Plummer, Md., 51 Atl. Rep. 823.

8. APPEAL AND ERROR—Harmless Evidence.—A judgment will not be reversed because of admission of improper evidence, where it appears that with or without such evidence the party obtaining the judgment was entitled thereto.—Dixon v. Smith, Mass., 63 N. E. Rep. 419.

9. APPEAL AND ERROR—Inability to Pay Costs.—Where there are several plaintiffs in error, an affidavit of in-

ability to pay costs, made by any number less than all, is insufficient to bring the case to the court in *forma pauperis*.—Walker v. Equitable Mort. Co., Ga., 40 S. E. Rep. 1010.

10. APPEAL AND ERROR—Objections.—Where a judgment is affirmed by the appellate court, an objection to the charge, not made in that court, cannot be raised for the first time in the supreme court.—Suburban R. Co. v. Balkwill, Ill., 63 N. E. Rep. 389.

11. APPEAL AND ERROR—Pauper Affidavit.—A pauper affidavit on a writ of error must be entitled in the cause referred to in the bill of exceptions, or otherwise show the connection on its face.—Franklin v. Kreigshaber, Ga., 41 S. E. Rep. 47.

12. APPEAL AND ERROR—Remittitur Damnum.—Where there is no evidence in the record to support the verdict for plaintiff as to one particular item, judgment will be reversed, unless he remits as to such item.—Illinois Cent. R. Co. v. Tucker, Miss., 31 South. Rep. 792.

13. APPEAL AND ERROR—Transmission of Return for Amendment.—Pendency of an appeal to the court of appeals held no bar to a motion in the appellate division to amend an order of reversal.—Birnbaum v. May, N. Y., 63 N. E. Rep. 347.

14. ASSAULT AND BATTERY — Reasonable Force.—On a prosecution for assault, the question whether defendant used excessive force in defending her person and property held for the jury.—State v. Goode, N. Car., 41 S. E. Rep. 3.

15. ASSIGNEE—Non-Negotiable Chose in Action.—An assignee of a non-negotiable chose in action takes the same subject to equities existing between the debtor and the assignor at the time of the assignment.—Third Nat Bank v. Western & A. R. Co., Ga., 40 S. E. Rep. 1016.

16. ASSUMPSIT, ACTION OF—Accrual of Cause of Action.—Under contract between plaintiff, a boom company, and defendant, held, that by virtue of Rev. St. ch. 94, an action of *assumpsit* will lie to recover the unpaid rental, though the parties have never been able to determine the amount thereof.—Rumford Falls Boom Co. v. Rumford Falls Paper Co., Me., 51 Atl. Rep. 810.

17. BAIL — Jurisdiction of Recorder.—Where one charged with an offense against a municipal ordinance is on trial before the recorder in the municipal court, and the evidence shows a violation of a penal statute, the recorder can, under Pen. Code, § 927, commit him to jail or bind him over to the criminal court.—Newton v. Fain, Ga., 40 S. E. Rep. 993.

18. BILLS AND NOTES—Attorney's Fees.—Where a note stipulates for attorney's fees, not to exceed 10 per cent., it is error to instruct to give attorney's fees in a sum not less than 10 per cent.—Cramer v. Huff, Ga., 41 S. E. Rep. 57.

19 BILLS AND NOTES—Demand and Notice.—Where a corporation gave its note, indorsed by it in blank, and defendant, on the back of the note, under the name of the maker, put in his own name, he was an indorser only.—Yates v. Goodwin, Me., 51 Atl. Rep. 804.

20. BOND—Liability of Surety.—Where a judgment overruling demurrer to a petition is affirmed, the surety on a *supersedeas* bond is liable only for costs of prosecuting the writ of error.—Franklin v. Kreigshaber, Ga., 41 S. E. Rep. 47.

21. BROKERS—Procurement of Loan.—Where a person contracts to procure a loan for another, and no time is fixed, the contract will be construed to mean that the loan is to be procured within a reasonable time.—Collier v. Weyman, Ga., 41 S. E. Rep. 50.

22. BUILDING AND LOAN ASSOCIATIONS—Purchase of Stock.—A purchaser from a building association of fully paid stock held a creditor thereof, and entitled to be dealt with as such in the distribution of its assets.—Cashen v. Southern Mut. Building & Loan Assn., Ga., 41 S. E. Rep. 51.

23. BURGLARY—Possession of Stolen Goods.—On trial for burglary, recent possession of the stolen property held not of itself necessarily a proof of guilt.—Gravitt v. State, Ga., 40 S. E. Rep. 1003.

24. COMMERCE—Emigrant Agent.—The business of hiring laborers and soliciting emigrants is not "an article of commerce," within Const. art. 1, § 8, so that requiring an emigrant agent to obtain a license is in violation of such provision.—State v. Napier, S. Car., 41 S. E. Rep. 13.

25. CONSPIRACY—Illegal Voting.—A prosecution for conspiracy to procure illegal votes is not defeated by the fact that defendants made their plan before they knew the names of any of the persons named in the indictment as the persons to be procured to vote illegally.—Commonwealth v. Rogers, Mass., 63 N. E. Rep. 421.

26. CONSTITUTIONAL LAW — Eight-Hour Law.—Pen. Code, § 384b, subd. 1, providing for the punishment of any person who shall require an employee to work more than eight hours a day on a public contract, held unconstitutional.—People v. Orange County Road Const. Co., 75 N. Y. Supp. 510.

27. CONTEMPT—Power of Court.—1 Gen. St. p. 392, does not operate to preclude the chancery court from imposing a jail sentence for a contempt in failing to comply with a restraining order.—Frank v. Harold, N. J., 51 Atl. Rep. 774.

28. CONTRACTS—Action for Breach.—Where defendant rented the booms and piers from a boom company at a fixed rental, it is not liable in *assumpsit* for failure to repair the booms and piers; the remedy being by an action for breach of contract.—Rumford Falls Boom Co. v. Rumford Falls Paper Co., Me., 51 Atl. Rep. 810.

29. CONTRACTS — Architect's Certificate.—Failure of architect to give certificate held no ground for refusing to enforce building contract.—Happel v. Marasco, 75 N. Y. Supp. 461.

30. CONTRACTS — Rights of Widow as a Consideration.—The voluntary surrender by a widow of personal property belonging to her husband's estate is a valid consideration for a promise by the recipient, even though the estate was insovent, since the probate court could have allowed such property to her free of the claims of creditors.—Gunther v. Gunther, Mass., 63 N. E. Rep. 402.

31. CONTRACT—Subsequent Parol Variation.—A written contract may be varied by a subsequent parol contract, unless forbidden by the statute of frauds.—Illinois Cent. R. Co. v. Mannion, Ky., 67 S. W. Rep. 40.

32. CORPORATIONS — Stockholders. — Where subscription to stock is made in accordance with another contract, the latter, inferentially operating to modify the express engagement of the stockholders, must be made part of the complaint in a suit to recover on the subscriptions.—Carnahan v. Campbell, Ind., 63 N. E. Rep. 384.

33. COURTS—Foreign Corporation.—After final judgment in an action against a foreign corporation has been carried out, the case is no longer pending in the state, so that the court would still have jurisdiction of such corporation.—Emanuel v. Ferris, S. Car., 40 S. E Rep. 20.

34. CRIMINAL EVIDENCE—Confessions — In order to prove confessions of guilt immediately after the arrest of the accused, the state need not be required to examine the arresting officer to ascertain if he used any threats or offered any inducements.—Price v State, Ga., 40 S. E. Rep. 1015.

35. CRIMINAL EVIDENCE — Describing Wounds.—In a prosecution for murder, testimony of a doctor describing the wounds held not inadmissible as stating the position of the parties.—Morton v. State, Tex., 67 S. W. Rep. 115.

36. CRIMINAL LAW—Jurisdiction of Justices. — Code Pub. Gen. Laws, art. 52, § 11a, has no application to the jurisdiction of justices of the peace, outside of that conferred by the statute of which it is a part, and does not affect the jurisdiction of justices over cases arising un-

der Pub. Loc. Laws Anne Arundel County, §§ 253-256.—State v. Ward, Md., 51 Atl. Rep. 848.

37. CRIMINAL TRIAL—Consolidation.—Fact that statute required district attorney to charge but one fee where parties could be jointly indicted held not to require that prosecutions against different defendants, but arising out of same transaction, should be consolidated.—McAner v. State, Tex., 67 S. W. Rep. 117.

38. CRIMINAL TRIAL—Instruction.—Where the judge of his own motion gives an instruction on the theory of the defense as shown by the statement of the accused, the instruction must be applicable to such theory.—Richards v. State, Ga., 40 S. E. Rep. 1001.

39. CRIMINAL TRIAL—Jury Discussing Former Vdrdict. —Discussion by a jury of a former verdict against defendant in the same case held to be misconduct requiring a reversal.—Hughes v. State, Tex., 67 S. W. Rep. 104.

40. CRIMINAL TRIAL—Mandamus.—Where a judge refuses to entertain a motion in vacation to set aside a judgment in a criminal case, and a bill of exceptions is filed, the supreme court will not by *mandamus* compel the judge to do any act which would supersede the judgment sought to be set aside.—Haskens v. State, Ga., 40 S. E. Rep. 997.

41. CRIMINAL TRIAL—Newly-Discovered Evidence.—A motion for new trial for newly-discovered evidence is without merit, where it is not shown that accused before the trial was unaware of its existence.—Jackson v. State, Ga., 40 S. E. Rep. 989.

42. CRIMINAL TRIAL—Newly-Discovered Evidence.—Alleging newly-discovered impeaching evidence as a ground for a new trial in a criminal case is insufficient. —May v. State, Tex., 67 S. W. Rep. 108.

43. DEEDS—Condition Subsequent.—Where a conveyance is on a condition subsequent that the grantee shall support the grantor on the granted premises, and the grantor leaves the premises voluntarily, a contention that there has been a breach because of non-support was of no merit.—Lewis v. Lewis, Conn., 51 Atl. Rep. 854.

44. DEEDS—Construction.—A deed conveying a lot of land bounded on one side of a street will embrace the lands to the center thereof, where there has been some showing that the grantor in the deed had title to such center line.—Humphreys v. Eastlack, N. J., 51 Atl. Rep. 775.

45. DEEDS — Defective Acknowledgment by Married Woman.—A deed to realty within the state, executed in another state by a married woman living therein, and according to the laws of such state, but not privily acknowledged as required by Code, § 1256, held void, not only as a deed, but as a contract.—Smith v. Ingram, N. Car., 40 S. E. Rep. 984.

46. DEPOSITIONS—Filing.—A deposition not filed within 10 days, and not appearing to have been read to deponent before it was signed, will be suppressed, but with opportunity to cure the defects.—Faith v. Ulster & D. R. Co., 75 N. Y. Supp. 420.

47. DOWER—Seizen in Husband.—Where the purchaser of land, by the same instrument by which he acquired title, leased the land to the vendor, the purchaser was beneficially seised of the estate, so as to entitle his widow to dower.—Nolen v. Rice, Ky., 67 S. W. Rep. 36.

48. EASEMENTS—Ordinance.—A railway company continuing in the undisturbed possession for over 20 years of land belonging to a city, under an ordinance of the city, acquires an easement to such lands.—Board of School Trustees of City of San Antonio v. Galveston, H. & S. A. Ry. Co., Tex., 67 S. W. Rep. 147.

49. EJECTMENT — Equity Setting Aside Deed.—The guardian of an insane person cannot recover real estate, conveyed by the ward before he is adjudged insane, by an ejectment suit, without the deed being first set aside in equity.—McAnaw v. Clark, Mo., 67 S. W. Rep. 249.

50. EJECTMENT—Right of Entry.—One of two or more persons holding a vested right of entry for condition broken may maintain ejectment with an actual entry.—Bouver v. Baltimore & N. Y. Ry. Co., N. J., 51 Atl. Rep. 781.

51. ELECTIONS—Divorced Woman.—A divorced woman was not entitled to vote in an election for school trustees, where the judgment of divorce did not give her the custody of the children of the marriage.—Ball v. Cawood, Ky., 67 S. W. Rep. 37.

52. ELECTIONS—Printing Candidates' Names. — That portion of the election act (St. 1898, ch. 548), which regulates caucuses is not unconstitutional, in authorizing the printing on ballots of the names of candidates presented by a certain number of voters; blanks being left for the insertion of the names of other candidates whose names are not so presented.—Commonwealth v. Rogers, Mass., 63 N. E. Rep. 421.

53. ELECTIONS—Validity of Act.—The provision in the election act (St. 1898, ch. 548), for the use of voting lists as check lists, and the denial of the right to vote to those whose names do not appear upon the lists, is not invalid, as fixing a higher qualification for voting than is required by the constitution.—Commonwealth v. Roger, Mass., 63 N. E. Rep. 421.

54. ELECTRICITY—Contributory Negligence.—Recovery for injury to child from electric light wire on roof of building, by his taking hold of it, held barred by contributory negligence; his mother, though knowing of the wire, having placed him where he could get hold of it.—City of Cumberland v. Lottig, Md., 51 Atl. Rep. 841.

55. EMINENT DOMAIN—Compensation. — The original owners of land appropriated by a railroad company held not entitled to compensation on a subsequent appropriation of the same tract by another company.—Northern R. Co. v. Earhart, Mo., 67 S. W. Rep. 229.

56. EMINENT DOMAIN—Right to Compensation.—The fact that the building of a trestle by a railroad company across a navigable channel under the authority of the state legislature and an act of congress has damaged the business of plaintiff does not entitle him to compensation from the railroad company; none of his property having been entered upon or used by such company.—Frost v. Washington County R. Co., Me., 51 Atl. Rep. 805.

57. EQUITY—Tips on Horse Races.—An injunction will not be granted to assist a company in selling tips on horse races in violation of law.—Maxim & Gay Co. v. Sheehan, 75 N. Y. Supp. 422.

58. ESTOPPEL—Limitations.—Defendants in ejectment, who claimed by limitations, and not under a certain deed by a former owner, held not estopped from questioning the validity of the deed.—Hunt v. Searcy, Mo., 67 S. W. Rep. 206.

59. ESTOPPEL—Wife's Conveyance.—No estoppel can arise against a married woman by virtue of a deed not privily acknowledged by her as required by Code, § 1256, or by virtue of a covenant of warranty therein, though both would have been valid in the state where the deed was executed.—Smith v. Ingram, N. Car., 40 S. E. Rep. 984.

60. EVIDENCE—Evidence and Comparison of Handwriting.—Writings which plaintiff had signed by making her mark were not admissible as evidence for her to show that she could not write, or for the purpose of comparing them with a disputed writing to which her name was signed without her mark.—Phœnix Nat. Bank v. Taylor, Ky., 67 S. W. Rep. 27.

61. EVIDENCE—Letters as Admissions. — A letter from the chief engineer of defendant railroad company to plaintiff, a contractor, proposing a compromise of his claim for extra work in raising defendant's roadbed, is admissible against defendant as an admission, to the extent that it states that certain facts are shown by a remeasurement of the work. — Illinois Cent. R. Co. v. Manion, Ky., 67 S. W. Rep. 40.

62. EVIDENCE—Res Gestæ.— The modern tendency is to extend, rather than to narrow, the rule as to the ad-

mission of declarations as part of the *res gestæ*, and to consider the grounds which formerly excluded such declarations as affecting their weight only. — Jack v. Mutual Reserve Fund Life Assn., U. S. C. C. of App., Fifth Circuit, 113 Fed. Rep. 49.

63. EXECUTION - Death of Plaintiff.—Where, on levy of two executions, plaintiff in execution died, and a third person interposed a claim, and was met by the usual rejoinder in the name of the deceased claimant, the proceeding is a nullity. — Ray v. Anderson, Ga., 41 S. E. Rep. 60.

64. EXECUTION—Property in Hands of Receiver.—Motion to vacate execution of a judgment obtained by creditor against corporation in voluntary dissolution denied.—Fox v. Union Turnpike Co., 75 N. Y. Supp. 464.

65. EXECUTION—Res Judicata.— Where the execution under which property is about to be sold is based on a decree to which parties interposing a statutory claim were parties, a demurrer was properly sustained as *res judicata*. — Walker v. Equitable Mortg. Co , Ga., 40 S. E. Rep. 1010.

66. EXECUTORS AND ADMINISTRATORS — Debt Due Estate. — An administrator owning an estate, by crediting the estate with the debt and charging the same against his distributive share, cannot stop the running of interest.—*In re* Davis, 75 N. Y. Supp. 493.

67. EXECUTORS AND ADMINISTRATORS— Specific Legacies. - No commissions are allowed on a specific legacy.—*In re* Robinson, 75 N. Y. Supp. 490.

68. EXEMPTIONS—"One-Horse Wagon." A half interest in a two horse wagon is not exempt under Civ. Code, § 2865, as "a one-horse wagon." — Kirsey v. Rowe, Ga., 40 S. E. Rep. 990.

69. FALSE IMPRISONMENT — Liability.— County commissioners are not liable for the tortious and unauthorized act of a road supervisor in procuring an arrest for failure to work on roads. Carter v. Worcester County Comrs., Md., 51 Atl. Rep. 830.

70. FALSE IMPRISONMENT - Punitive Damages.—In an action for unlawful arrest, evidence of the reputed wealth of defendant was competent on the question of punitive damages.—Tucker v. Winders, N. Car., 41 S. E. Rep. 8.

71. FIRE INSURANCE—Proof of Loss.—Complaint in an action on fire policy held insufficient, because not averring that 60 days had elapsed since filing proofs of loss. —Clemens v. American Fire Ins. Co., 75 N. Y. Supp. 484.

72. FORCIBLE ENTRY AND DETAINER — Quasi-Public Corporation. — Rev. St. ch. 94, § 1, providing for an action of forcible entry and detainer, held applicable where the tenant is a *quasi*-public corporation engaged in supplying electricity for lighting or other purposes.— Bodwell Water Power Co. v. Old Town Electric Co., Me., 51 Atl. Rep. 802.

73. FRAUDS, STATUTE OF — Partition Proceedings. — A parol contract for the partition of lands is not within the prohibition of the statute of frauds after execution by written conveyances. — Bacon v. Fay, N. J., 51 Atl. Rep. 797.

74. GAME — License to Shoot. - One to whom license has been issued to establish a blind in the waters of South river, off "South Point," and shoot therefrom, under Loc. Laws Anne Arundel County, §§ 254, 255, 259, has no right to any particular spot off such "South Point," superior to another licensee, under a similar license, until he has first established his blind.—Bannon v. Scheckell, Md., 51 Atl. Rep. 836.

75. GRAND JURY—Residence of Members. — An objection that an individual member of the grand jury was not a resident of the county cannot be raised after the indictment was found. — People v. Scannell, 75 N. Y. Supp. 500.

76. HOMESTEAD — Recording Deeds. — Failure to record deed to homestead held not to preclude wife from asserting homestead rights as against purchaser of fraudulent vendor lien notes, executed by husband in connection with subsequent recorded, but fictitious, deed. — Texas Land & Mortg. Co. v. Cooper, Tex., 67 S. W. Rep. 173.

77. HUSBAND AND WIFE— Conditional Sale.—Where a married woman obtains possession of personalty under a contract to pay a certain sum per week, and providing that on default the other party may retake the goods, on default in a payment the other party may recover the property, though the wife be not a free trader.—Thomas v. Cooksey, N. Car., 41 S. E. Rep. 2.

78. INFANTS— Action Against by Mother — In an action by a mother against her infant children under 14 years of age, the court was authorized to appoint a guardian *ad litem* for the service of process.—Boro v. Holtzhauer, Ky., 67 S. W. Rep. 30.

79. INJUNCTION—Remedy at Law. — A petition for injunction will be denied, where all the matters can be pleaded by the present plaintiffs in a common-law suit brought against them by the defendants.—Winn v. Pittman, Ga., 40 S. E. Rep. 993.

80. INSURANCE - Death of Beneficiary before Assured.— Insurance company held not estopped to assert that life policy was payable to beneficiary's legal representatives, where she predeceased insured, and not to insured's estate. — Preston v. Connecticut Mut. Life Ins. Co., Md., 51 Atl. Rep. 831.

81. INSURANCE—Disappearance of Assured.—Where a life policy stipulates that disappearance of insured shall not be evidence of death or any right to recover till the full term of expectation has expired, the beneficiary cannot sue without alleging that the full term of life expectancy has expired. — Porter v. Home Friendly Soc., Ga., 41 S. E. Rep. 45.

82. INTOXICATING LIQUORS — Dispensary Law. — The terms "storing" and "keeping in possession" of contraband liquors, used in the dispensary law, involve the idea of continuity or habit. — Easley Town Council v. Pegg, S. Car., 41 S. E Rep. 18.

83. INTOXICATING LIQUORS—License.—The holder of a license to sell liquors cannot, though the same has been lawfully granted, lawfully sell thereunder after the license has been duly revoked.—McGehee v. State, Ga., 40 S. E. Rep. 1004.

84. INTOXICATING LIQUORS—Search and Seizure. — On a trial for keeping intoxicating liquors for unlawful sale, if some of the liquors mentioned in the complaint are found in the place described, and were kept for unlawful sale, it is immaterial that other liquors were described in the complaint, or were seized by the officer and included in his return. — State v. Bradley, Me., 51 Atl. Rep 816

85. JUDGMENT — Absence of Defendant.—A judgment rendered in the absence of defendant should not be set aside, unless for a meritorious reason.—Kellam v. Todd, Ga., 41 S. E. Rep. 39.

86. JUDGMENT — Action on Note. — Action on several of a series of notes, some not matured, except under a stipulation that all should become due on default of any one, is not a suit "founded on unconditional contracts in writing," within Const. art. 6, § 4, par. 7, so that a verdict of a jury is not necessary before judgment.—Howard v. Wellham, Ga., 41 S E Rep. 62.

87. JUDGMENT—Dismissal. — A judgment of dismissal held not a bar to a subsequent action for the same cause, unless it is stated that the judgment is rendered on the merits. — Genet v. President, etc., of Delaware & H. Canal Co., N. Y., 63 N. E. Rep. 350.

88. JUDGMENT—New Trial.—The court is less inclined to disturb a judgment granting, than one refusing a new trial.—Butts v Christy, Ky., 67 S. W. Rep. 377.

89. JUDGMENT—Prior Litigation.—The fact that a party to a suit was a witness in a prior suit involving the same property held not to render the decree in such prior suit binding upon her.—Bacon v. Fay, N. J., 51 Atl. Rep. 797.

90. JURY—Public Nuisance.— In an action to restrain the obstruction of a public road, the question of nuisance should be tried by a jury, and not by a referee.— Lipscomb v. Littlejohn, S. Car., 40 S. E. Rep. 1023.

91. JUSTICE OF THE PEACE — Action on Account — Where, on appeal from a justice in an action on a verified account, there is a counter affidavit filed, and plaintiff's attorney calls defendant, who testifies there is nothing due, it is proper to direct a verdict for the defendant.—O'Dell v. Meacham, Ga., 41 S. E. Rep. 41.

92. JUSTICE OF THE PEACE—Jurisdiction. — A justice of the peace has jurisdiction of an action by the seller in a conditional sale to recover the goods from purchaser on default of an installment, where the value of the goods is under $50. — Thomas v. Cooksey, N. Car., 41 S. E Rep. 2.

93. LANDLORD AND TENANT — Ice on Sidewalk.— A landlord is not liable for injuries received from falling on ice which a tenant had allowed to accumulate on the sidewalk.—Gardner v. Rhodes, Ga., 41 S. E. Rep. 63.

94. LARCENY — Principal. — One who assists in a larceny under a belief that the property stolen belonged to the person whom he is assisting, but who continues to aid when he learns that such is not the fact, is guilty as principal.—Green v. State, Ga., 41 S. E. Rep. 55.

95. LARCENY— Venue. — Where property is stolen in one county and removed to another, the larceny is punishable is either.—Green v State, Ga., 41 S. E. Rep. 55.

96. LIEN — Assignment. — Accepted order, drawn by contractor on owner in favor of material-man, held an assignment to that extent of any money due.— White v. Livingston, 75 N. Y. Supp. 460.

97. LIFE ESTATES — Increase of Capital Stock. — New shares of stock issued against the accumulated surplus of a corporation held to constitute capital, and not income, so as to belong to the remainder-men, and not to the life tenant. — Chester v. Buffalo Car Mfg. Co., 75 N. Y. Supp. 428.

98. LIMITATION OF ACTIONS — Statute of Frauds. — A parol purchaser's right to recover purchase money does not accrue until the vendor has refused to carry out the contract, and is not barred until five years from that time. — Lyttle v. Davidson, Ky., 67 S W. Rep. 34.

99. LOTTERIES—Trading Stamps. — Laws 1898, ch. 207 (Code Pub. Gen. Laws, §§ 263a, 263b, 263c), relating to the giving of trading stamps as an inducement to the sale of goods, held valid, except so far as it prevents the seller from redeeming the stamps at any other place than where the sale was made.— State v. Hawkins, Md., 51 Atl. Rep 850

100. MALICIOUS PROSECUTION— Demurrer. — Where a petition in an action for malicious prosecution of a civil proceeding alleges the wrongful suing out of a garnishment, and it appears that plaintiff was cast therein, and the garnishment was productive, a demurrer was properly sustained.— Duckworth v. Boykin, Ga., 41 S. E Rep 52.

101. MASTER AND SERVANT—Assumption of Risk. — An experienced railroad employee, thoroughly familiar with the yard in which he works, who continues in service with knowledge that the usual condition of the yard is one of permanent congestion of cars, assumes the risks incident thereto. — Bence v. New York, N. H. & H. R. R., Mass., 63 N. E. Rep 417.

102. MASTER AND SERVANT— Contract of Employment. - Hiring for indefinite period at fixed sum per week can be terminated by either party at the end of any week.—Dunbar v. Cuban Land & Steamship Co., 75 N. Y Supp. 498.

103 MASTER AND SERVANT - Death of Employee — In an action for the death of an employee where there is no evidence of negligence of defendant, or that the employee by ordinary diligence could not have avoided injury, a nonsuit was properly granted.— Roul v. Palmer Brick Co., Ga., 41 S. E. Rep. 40.

104. MASTER AND SERVANT—Negligence. — Where the owner of a building employed a man to repair a wall, held, the relation of master and servant was not established, so that he was not liable for injury to adjoining premises resulting from negligence in making such repairs. — Dutton v. Amesbury Nat. Bank, Mass., 63 N. E. Rep. 405.

105. MASTER AND SERVANT — Personal Injuries. — Allowing plaintiff, in an action for injuries received in defendant's service, to show that defendant held liability insurance against the judgment, if rendered, held reversible error.—Herrin v. Daly, Miss., 31 South. Rep. 790.

106. MASTER AND SERVANT—Presumption of Payment. —The negligence of a servant in failing to collect her wages held to impose a burden on her of explaining such neglect, in action for her wages brought to trial after the death of the employer.— Taylor v. Beatty, Pa., 51 Atl. Rep. 771.

107. MECHANICS' LIENS—Contractor's Cessation From Labor. — An error in the notice required by Code Civ. Proc § 1187, filed by an owner of an unfinished building, as to the date of the contractor's cessation from labor, held not prejudicial to a lien claimant.—Boscow v. Patton, Cal., 68 Pac. Rep. 490.

108 MINES AND MINERALS — Measure of Damages.— Lessors of a mine held entitled to recover, in an action for non-performance by lessees, only for whatever loss was sustained according as the mine proved profitable or otherwise, and hence not entitled to recover the cost of machinery, tools, and improvements which defendants failed to supply or make under their contract. — Cleopatra Min. Co. v. Dickinson, Wash., 68 Pac. Rep. 456.

109. MORTGAGES—Defeasant Contract.—The failure of a grantor to sign a contract binding the grantee to return the deed on the payment of a debt held not to invalidate the contract. — Kyle v. Hamilton, Cal., 68 Pac. Rep 484.

110 MORTGAGES — Inadequency of Price. — A foreclosure sale, which has been in all respects regular, will not be set aside for gross inadequacy of the price only. — McLain Land & Investment Co. v. Swofford, Bros. Dry Goods Co., Okla., 68 Pac. Rep. 502.

111. MORTGAGES—Lease of Premises. — Where plaintiff purchased land subject to a mortgagor's right to redeem, a lease of the land to the mortgagee was extinguished by redemption, and plaintiffs could not claim rents thereunder by virtue of junior mortgages under which they had never claimed possession. — Tatum v. Hollis, Ala , 31 South. Rep. 798.

112. MORTGAGES—Validity.—Where a deed, intended as a substitute for an existing mortgage, may be rescinded under Civ Code, §§ 1566, 1578, but is not rescinded, it is binding on the parties —Kyle v. Hamilton, Cal., 68 Pac. Rep 484

113 MORTGAGES — Violation of Covenant. — Question whether mortgage of leasehold violated covenant in lease held immaterial in foreclosure proceedings after foreclosure sale. — Lembeck & Betz Eagle Brewing Co. v. Kelley, N. J., 51 Atl. Rep. 794.

114. MUNICIPAL CORPORATIONS— Assessments for Improvements. — Assessments made for municipal improvements are not taxes within organic act, providing that all property subject to taxation shall be taxed in proportion to its value. — Jones v. Holzapfel, Okla., 68 Pac. Rep. 511.

115. MUNICIPAL CORPORATIONS — Contracts. — A city council had no jurisdiction to order additional work on a street paving contract not included in the resolution of intention, and the amount being included in the assessment rendered it entirely void. — Piedmont Pav. Co. v. Allman, Cal., 68 Pac. Rep 493.

116. MUNICIPAL CORPORATIONS — Defective Highways. —In an action against a town for injuries sustained by plaintiff, caused by an alleged defective highway, questions as to the cause of the injury held for the jury.—Coles v. Revere, Mass., 63 N. E. Rep. 430.

117. MUNICIPAL CORPORATIONS — General Assembly.— The general assembly may take from a municipal corporation its charter power respecting the police and

their appointment, and may provide for a permanent police under the control of a board of police, appointed as the general assembly may direct. — City of Americus v. Perry, Ga., 40 S. E. Rep. 1004.

118. MUNICIPAL CORPORATIONS— Grant of Franchise.—Consent of village trustees that street railway company may use the streets, where the trustees are stockholders, held void. — Hough v. Smith, 75 N. Y. Supp. 451.

119. MUNICIPAL CORPORATIONS—Icy Street —In action against city for injuries due to slipping on icy street, where there was evidence that the ice was formed, not by snow or rain, but by being emptied into the street by abutting owners, held error to direct a verdict for defendant. — Magaha v. City of Hagerston, Md., 51 Atl. Rep. 832.

120. MUNICIPAL CORPORATIONS — Illegal Ordinance.—The burden of showing that Morristown Ordinance Jan. 5, 1900, appointing commissioners to define the boundaries of a street under P. L. 1866, p 431, § 7, is invalid, because the street was not in existence when the statute was passed, is on the person attacking the ordinance.—Lathrop v. Town of Morristown, N. J., 51 Atl. Rep. 852.

121. MUNICIPAL CORPORATIONS — Liability of City. — That the committee on streets of the city council advised the street commissioner that it was his duty to repair a retaining wall held not to show that it assumed control of the work, so as to render city liable to an employee injured by negligence of the commissioner — Bowden v. City of Rockland, Me., 51 Atl. Rep 815.

122. MUNICIPAL CORPORATIONS—Unsanitary Condition. — A municipal corporation held not liable to one residing near a drain for illness in his family, arising from its obnoxious condition. — Williams v. Town of Greenville, N. Car., 40 S. E Rep. 977.

123. NAVIGABLE WATERS—Authority of State.— Under Const. U. S. art. 1, § 8, par 3, congress has exclusive jurisdiction over navigation, with power to authorize the obstruction, and even the closing, of the navigation of a tide-water channel.— Frost v. Washington, County R. Co., Me., 51 Atl. Rep. 806.

124. NEW TRIAL—Expression of Opinion by Court.—Where a judge expressed his opinion as to what had been proven, it is ground for a new trial.—Ficken v. City of Atlanta, Ga., 41 S. E. Rep. 58.

125. NUISANCE—Suit to Abate.—A private citizen cannot sue to abate a public nuisance unless specially injured.—Humphreys v. Eastlack, N. J., 51 Atl. Rep. 775.

126. PARTIES—Intervention.—On motion to set aside a decree, it is proper to allow any one who has a substantial interest therein to intervene.—Walker v. Equitable Mortg. Co., Ga., 40 S. E. Rep. 1010.

127. PARTITION—Equitable Title.—Title of complainant in partition suit held to be equitable, only so as to be cognizable by a court of equity without a prior legal determination.—Bacon v. Fay, N. J., 51 Atl. Rep. 797.

128. PAYMENT—Threatened Foreclosure.—That a mortgagor was threatened with foreclosure in case she did not pay the amount claimed by the mortgagee to be due is not duress.—Shuck v. Interstate Building & Loan Assn., S. Car., 41 S. E. Rep. 28.

129. PLEADING—Filing Defense.—Under Act Nov. 30, 1892, amending the act establishing the city court of Atlanta, where a defendant fails to file his defense before the first day of the return term, he loses his right to file any.—Dodson Printers' Supply Co. v. Harris, Ga., 41 S. E. Rep. 54.

130. PRINCIPAL AND SURETY — Release of Principal's Assignee. — A creditor, by releasing the assignee for creditors of the principal from liability for property that came into his hands, does not, any further than he thereby gives up security, release the surety.—Boston Penny Sav. Bank v. Bradford, Mass., 63 N. E. Rep. 427.

131. PROCESS — Non-resident Heirs. — Under Code, § 3421, where, in partition against heirs, a citation by publication is obtained for a non-resident heir, without affidavit or sworn bill that such heir was a non-resident, the decree is void.—Moore v. Summerville, Miss., 31 South. Rep. 798.

132. QUIETING TITLE—Prescriptive Rights.—In an action under St. 1889, ch. 442, the court cannot consider or determine prescriptive rights of parties to land or easements, but only such rights as appear of record.—Crocker v. Cotting, Mass., 63 N. E. Rep. 402.

133. RAILROADS—Construction Partnership —Where a lessee of a railroad turns its operation over to a construction partnership, the lessee held responsible for the negligence of such firm as the act of its agent.—Suburban R. Co. v. Balkwill, Ill., 63 N. E. Rep. 389.

134. RAILROADS—Killing Stock.—In an action against a railroad company for killing stock at intervals during two years, evidence examined, and held to support a verdict in favor of the plaintiff.—Illinois Cent. R. Co. v. Tucker, Miss., 31 South. Rep. 792.

135. RAILROADS—Personal Injury. — In an action for personal injury at a street crossing, an instruction that it would be sufficient if the defendant railroad either rang a bell or sounded a whistle "at the time of the alleged accident" held properly refused.—Suburban R. Co. v. Balkwill, Ill., 63 N. E. Rep. 389.

136. REAL ACTIONS—Burden of Proof.—The right of plaintiff to sustain action to recover realty must be made evident before defendant can be made to show title in himself.—Boyle v. West, La., 31 South. Rep. 794.

137. REMOVAL OF CAUSES—Foreign Corporation.—Under Act Cong. Aug. 13, 1888, a railway company, having complied with Act Feb. 10, 1899, cannot remove a cause to the United States Circuit Court on a petition not specifically alleging that it is a non-resident of North Carolina, but merely that it is a corporation originally created under the laws of Virginia. — Thompson v. Southern Ry. Co., N. Car., 41 S. E. Rep. 9.

138. SALES—Action of Price.—In action for the price of goods, defense averring that certain goods were damaged, and that defendant sold them on plaintiff account, but not showing that they were the goods mentioned in complaint, was demurrable.—Westcott v. Reiff, 75 N. Y. Supp. 488.

139. SALES—Ex Delicto Action.—In action to secure possession of property sold under conditional sale, testimony of defendant that she thought she had been given the goods held to raise no question for the jury.—Thomas v. Cooksey, N. Car., 41 S. E. Rep. 2.

140. SALES—Repossession of Seller.—The right to retake the property on default of payment of an installment therefor held to exist, whether the contract were a conditional sale or a bailment.—Thomas v. Cooksey, N. Car., 41 S. E. Rep. 2.

141. SALES—Time of Payment.—Where a contract for the sale of goods to be delivered by installments is silent as to the time for payment, it is to be made on delivery of each installment —Morton v. Clark, Mass., 63 N. E. Rep. 409.

142. SHERIFFS AND CONSTABLES—Compensation.—Under Const. art. 10, § 10, a public officer cannot create a liability against the county, except within some limit already fixed by the county board, and the county cannot be made liable for any expenditure, unless the board has fixed the sum for expenses for the same.—Coles County v. Messer, Ill., 63 N. E. Rep. 391.

143. SHERIFFS AND CONSTABLES—Fees.—Under 22 St. at Large, p. 584, the sheriff of Bamberg county held not entitled to fees for serving venires for petit jurors in civil cases.—Hunter v. Bamberg County, S. Car., 41 S. E. Rep. 26.

144. STREET RAILROADS—Grant of Franchise.—Where meeting of trustees of village is adjourned without disposing of application for street railroad franchise, it cannot be determined at a subsequent meeting without republication of notice of intention so to do.—Hough v Smith, 75 N. Y. Supp. 451.

145. STREET RAILROADS—Use of Streets.—Where the legislature authorizes the use of public streets in towns

for street railroad durposes, a town has no such property interest in the street as will entitle it to pecuniary compensation.—Appeal of Milbridge & C. Electric R. Co., Me., 51 Atl Rep. 818.

146. SUBROGATION—Defective Executor's Sale. — Purchasers of land at a defective executor's sale held entitled to subrogated to the rights of creditors and children of testator, so far as the money paid went to their benefit.—Hunter v. Hunter, S. Car., 41 S. E. Rep. 33.

147. TAXATION—City Lighting.—Where a lighting company contracted to maintain all naphtha lamps used by the city for lighting, lamps used by the company in performance of the contract held not personal property leased for profit, and taxable, within St. 1889,ch. 446, and Rev. Laws, ch. 12, § 23, cl 2.—Rising Sun Street Lighting Co. v. City of Boston, Mass., 63 N. E. Rep. 408.

148. TAXATION—Evidence o Place o Residence.— In a proceeding to determine the place of residence of the owner of personal property which has been assessed for taxation, a notice given by him to the selectmen of a town, to which soon thereafter he removed, that he intended to become a citizen of that town, was admissible. — Gardiner v. City of Brookline, Mass., 63 N. E. Rep. 397.

149. TAXATION—Tax Deed. — The fact that a tax deed refers to a repealed act as the warrant for the sale, and to no other acts, does not render the sale void. — Boyle v. West, La., 31 South. Rep. 794.

150. TRADE-MARKS AND TRADE-NAMES — Protection.— Equity will not protect a trade-mark for a patent medicine, the statement on the label "The great smallpox and diphtheria cure and preventative, cures the worst cases, without marking, unless already scabbed," asserting a falsehood, and being designed to deceive the public. — Houchens v. Houchens, Md., 51 Atl. Rep. 822.

151. TRIAL—Action for Injuries.—Failure to renew objections to evidence after one of the grounds of objection originally assigned had been removed, held not to cure error in admitting the evidence in the first instance.—Herrin v. Daly, Miss., 31 South. Rep. 790.

152. TRIAL—Credibility of Witness. Instruction compelling jury to find that a witness had either told the truth or perjured himself held erroneous. — Smith v. Lehigh Val. R. Co., N. Y., 63 N. E. Rep. 338.

153. TRIAL—Grounds for Relief.— Where complainant by his pleadings and evidence has submitted a certain ground of relief, he cannot, without amendment, present by argument an entirely different ground. — Humphreys v. Eastlack, N. J , 51 Atl. Rep. 775.

154. TRIAL—Objection to Evidence. — Where, on objection to evidence, the court stated that he would hear the evidence, subject to the objection, and the defendant excepted to the ruling and the admission of the testimony, and the record showed that the court considered such evidence, the exception was sufficient. — Coles County v. Messer, Ill., 63 N. E. Rep. 391.

155. TRUSTS— Cestui Que Trust as Trustee. — It is improper and incompatible with the relation of a *cestui que* trust toward the trust estate that she should afterwards be appointed trustee. — Woodbridge v. Bockes, N. Y., 63 N. E. Rep. 352

156. TRUSTS—Discretion of Trustee.—Provision in will bequeathing property to trustees held void because leaving to their discretion what amount of the net income they should apply to the use of the beneficiaries. —*In re* Sanford's Estate, Cal., 68 Pac. Rep. 494.

157. TRUSTEES—Increase of Funds. — Where trustees invested money received by the beneficiary, together with a portion of the trust funds, in stocks, the beneficiary held entitled to a proportionate share of the increase derived from such investment.— Smith v. Hooper, Md., 51 Atl. Rep. 844.

158. TRUSTS — Resulting Trusts. — Under Code Civ. Proc. § 853, when a transfer of realty is made to one person and the consideration partly paid by another, a resulting trust *pro tanto* arises.—Faylor v. Faylor, Cal., 68 Pac. Rep. 482.

159. USURY—Condition Precedent. — Where a lender requires, as condition precedent to the loan, that the borrower shall pay off a note which he is under no obligation to pay, it constitutes usury. — Bishop v. Exchange Bank, Ga., 41 S. E. Rep. 43.

160. VENUE—Officer's Official Bond.— Code Civ. Proc. §§ 394, 395, held not to authorize the removal of an action on a county treasurer's official bond to the county of the residence of one of the sureties, when the other sureties were residents of plaintiff. — Modoc County v. Madden, Cal., 68 Pac. Rep. 491.

161. WATERS AND WATER COURSES—Appropriations.— In a suit to restrain diversion of water, evidence held to sustain a finding that plaintiff's appropriation antedated defendants. — Medano Ditch Co. v. Adams, Colo., 68 Pac. Rep 431.

162. WATERS AND WATER COURSES — Appropriation of Water.—In a suit to restrain appropriations of water, a decree is not objectionable as unqualifiedly prohibiting the diversion of water between specified dates. — Medano Ditch Co. v. Adams, Colo., 68 Pac. Rep. 431.

163. WILLS—After-Born Children.—Under 3 Gen. St. p. 3760,§ 19, the amount to becontributed by legatees toward the portions of the children of the testator born after the making of the will is determined by treating each legacy as if it were the entire estate.— Lutjen v. Lutjen, N. J., 51 Atl. Rep. 790.

164. WILLS—Charitable Uses.— In substituting a charitable trust, creating library funds, if designated beneficiaries, the court can determine who, in addition to the beneficiaries named in the will, might be admitted to the benefits of the trust, under the principles deducible from the intent of the testator — Lanning v. Commissioners of Public Instruction of City of Trenton, N. J., 51 Atl. Rep. 787.

165. WILLS—Expenses of Caveat.—Under Acts 1898, ch. 331, § 4, giving a widower one-third of the personalty of his wife if he renounces all claims to any devise, etc., the property taken by a renouncing widower may not be charged with the expenses of a *caveat* contest.—Grabill v. Plummer, Md., 51 Atl. Rep. 823.

166. WILLS—Judgment of Probate.— Pending appeal from judgment of probate court on question of will or no will, no administrator can be appointed.—Appeal of Wessinger, S. Car., 41 S. E. Rep. 17.

167. WILLS—Mental Capacity When Testaror Excludes Relatives. — Will held valid, though relatives are excluded therefrom. — *In re* Evans' Will, 75 N. Y. Supp. 491.

168. WILLS—Release of Legacy. — A legatee held not bound by a release of his legacy executed in reliance upon the statement of his stepmother, who was also administrator *c. t. a.*, that the amount paid was all he was entitled to. — Lutjen v. Lutjen, N. J., 51 Atl. Rep. 790.

169. WILLS—Testamentary Trust. — Two clauses of a codicil, one giving a legacy in trust for a devise, and the other, when taken by itself, seeming to give her a legacy in fee, held, when construed together and with the will, to give her only one legacy, and that through her trustees. — Dunbar v. Dunbar, Mass., 63 N. E. Rep. 416.

170. WILLS—Witnesses to Codicil. — Legatees, subscribing witnesses to codicil under which they are not benefited, held not to lose their rights under the will —*In re* Johnson's Will, 75 N. Y. Supp. 489.

171. WITNESSES—Cross-Examination —Where a party examines a witness on a single point, the opposite party can cross-examine on the merits.—Ficken v. City of Atlanta, Ga., 41 S. E. Rep. 58.

172. WITNESSES—Surprise and Accident.— The jury in an action involving an issue of fraud in an assignment of notes held authorized to disregard the testimony of the assignee, who was the real party in interest. — Reeder v. Traders' Nat. Bank, Wash., 68 Pac. Rep. 461.